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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

SEPTEMBER TERM, 1912.

BY
W. W. CORNWALL
REPORTER

VOLUME XXXVIII.

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- Perry*—JOHN SHORTLEY.
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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

AT
DES MOINES, SEPTEMBER TERM, 1912.

AND IN THE SIXTY-SIXTH YEAR OF THE STATE.

HARRY I. STELTZER v. CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, Appellant.

Contracts: ASSIGNMENT OF WAGES: VALIDITY. A contract by which
1 an employee, for the purpose of obtaining credit, gives the master authority to deduct from his wages an amount sufficient to pay his living expenses is not void as a unilateral contract, or as a mere license or privilege without consideration; since thereby the employee was enabled to procure credit and thus secure his employment.

Same: RIGHTS OF ASSIGNEE. The assignee of the wages of a rail-
2 way employee acquires no greater right thereto than the assignor had at the time of the assignment.

Garnishment: SERVICE OF NOTICE. Where the statute of a foreign
3 state provided that notice of garnishment in justice court should be
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2 STELTZER v. CHICAGO, M. & ST. P. RY. CO. [156 Iowa

served in such manner as the justice directed, and he ordered service of notice by mail on the claimant of the fund, service had in that manner was sufficient.

Same: FOREIGN JUDGMENTS: CONCLUSIVENESS. Where a debtor has
4 been regularly garnished in a foreign state the claimant of the fund by assignment, who had proper notice of the garnishment but failed to appear and protect his rights, can not maintain suit against that garnishee for the fund in the courts of this state.

Appeal from Perry Superior Court.—HON. JOHN SHORTLEY, Judge.

SATURDAY, FEBRUARY 10, 1912.

SUIT to recover on assignments of wages. The cause was tried in equity, and both parties appeal. The defendant will be designated as the appellant. Affirmed on plaintiff's appeal, and reversed on appeal by defendant.

J. C. Cook, J. N. Hughes, and C. R. Sutherland for appellant.

H. S. Dugan, G. J. Dugan, and W. W. Cardell for appellee.

SHERWIN, J.—The plaintiff sued on assignments of wages to be earned in the future by men in the employ of the defendant railway company; the assignments having been made to the plaintiff to secure indebtedness to him. All of the men making these assignments entered into the employ of the railway company under written contracts, the material part of which is as follows: "In consideration of my being employed by the Chicago, Milwaukee & St. Paul Railway Company, and to enable me to receive credit for board, meals and lodging while I am in its employ, I hereby agree and consent that the said Chicago, Milwaukee & St. Paul Railway Company may deduct and

withhold from my wages any and all sums that may be due or owing from me to any and all persons for board, meals or lodging, and that it may pay the same for me and on my account and deduct the amount so paid or so required from any and all wages due me at any time."

The defendant pleaded that it was necessary, and for many years had been the custom of defendant, to secure credit for its employees engaged in the operation of its trains to enable them to secure meals, meal tickets, board, and lodging while away from home and engaged in the line of their employment; that arrangements were made whereby employees could secure meal tickets, board, and lodging, etc.; and that the contracts set out herein were made with employees, including those making the assignments to the plaintiff. The assignments in question were all made after the contracts with the defendant were entered into by the assignors thereof, and notice of such assignments were left with the defendant's local agent at Perry. Pursuant to its contract with the employees in question, the defendant paid their bills, and deducted the amounts thereof from their wages as long as they continued in its employ. The evidence shows that these employees did not intend that their assignments to the plaintiff should act as a revocation of authority given the defendant in their contracts, because they still relied upon the defendant to secure them board and lodging and requested that deductions from their wages be made therefor. Whether these contracts be designated assignments of so much of the wages of the employees as was necessary to feed and house the employees when away from home in the service of the company, or whether they be termed contracts under which the defendant had the right to pay the debts of the employee, is not of great importance. In either view of the matter, if it was a valid and enforceable agreement that was acted upon by the defendant, the plaintiff has no right superior to that of the defendant.

In our judgment, the contracts were not unilateral, as claimed by the plaintiff; nor was the employees' agreement a mere license or privilege without consideration. It be-

1. **CONTRACTS: as-
signment of
wages: valid-
ity.** came effective when the employee entered the service of the defendant, and under its terms the company secured the services of the employee, and the employee secured the credit that was necessary to provide himself with the necessities of life, during a period when nothing was due him from the company. It is a matter of common observation that a certain class of railway employees must be taken care of in this very manner, otherwise they would be unable to engage in such employment, and that railway companies require such arrangement for the purpose of securing and keeping employees, and thus protecting itself.

That the plaintiff had no greater right by reason of the assignment that his assignor had at the time of such assignment is well settled. *Metcalf v. Kincaid*, 87 Iowa, 443; *Brewing Co. v. Hansen*, 104 Iowa, 307.

2. **SAME: rights
of assignee.** The trial court was in error in holding the plaintiff entitled to recover. It is claimed by the appellant that the notices of the assignments to the plaintiff were insufficient to charge it, because they were simply handed to its local agent. We do not determine this matter, because of our conclusion on the merits.

Some time before this suit was brought, the defendant was garnished in Illinois as the supposed debtor of one of the plaintiff's assignors. It answered that it had in its

3. **GARNISHMENT:
service of
notice.** hands unpaid wages due the defendant in the attachment proceeding, but alleged the assignment thereof to the plaintiff herein.

Thereupon the case was continued, and the court ordered service on this plaintiff, as provided by Hurd's Statutes of Illinois of 1909, chapter 79, sections 92 and 93, which provide as follows:

If it appears that any goods, chattels, choses in action, credits and effects in the hands of a garnishee are claimed by any other person, by force of an assignment from the defendant or otherwise, the justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served on him in such a manner as the justice shall direct.

If such claimant appears, he may be admitted as a party to the action, so far as respects his title to the property in question, and may allege and prove any facts necessary to establish his claim to such property; and such allegations shall be tried and determined in the manner hereinbefore provided. If such persons shall fail to appear after having been served with notice in the manner directed, he shall be concluded by the judgment in regard to his claim.

There is sufficient proof that this plaintiff received notice of these proceedings in the Illinois court in ample time to have appeared and protected his interest, if he so desired. He paid no attention to the matter, however, and judgment was rendered against the defendant and paid.

The Illinois statute provides that notice shall be "issued and served" in "such manner as the justice shall direct." The justice ordered that notice be served on this plaintiff by mail, and this was done. This was sufficient under the statute.

The court in Illinois had jurisdiction in the matter, and its judgment should be recognized, and the defendant as garnishee be protected by the courts of this state. *Harris v. Balk*, 198 U. S. 215 (25 Sup. Ct. 625, 49 L. Ed. 1023). On plaintiff's appeal the judgment should be affirmed.

Affirmed on plaintiff's appeal, and *reversed* on the defendant's appeal.

4. SAME: foreign
judgements:
conclusiveness.

MARSHALL INVESTMENT Co., Appellee, v. CORA B. LINDLEY, et al., Appellants. Consolidated with one other case, viz: MARSHALL INVESTMENT Co., Appellee, v. W. C. ALLEN, J. W. MEADDER, et al., Appellants.

Equitable liens: CONTRACTS: SUBSTANCE RATHER THAN FORM. Equity
1 looks to the substance and not to the form of a contract. Thus where a corporation exchanged land subject to a specified mortgage indebtedness, and prior to the conveyance executed mortgages on the property to its secretary, which with the previous mortgage amounted to the indebtedness specified, it is *held* that the transaction operated in equity as a reservation to the corporation of a lien on the property for that sum, even though it be conceded that the mortgages created no actionable obligation between the parties.

Same: CONVEYANCE SUBJECT TO MORTGAGE: PRESUMPTION. Where
2 land is sold subject to a mortgage the land becomes the primary fund for payment of the indebtedness, and the incumbrance is presumed to have been provided for in adjusting the consideration.

Same: EQUITABLE LIENS: NOTICE. Where a corporation executed
3 mortgages upon its property to itself as mortgagee, and conveyed the land subject thereto, the transaction is held to create an equitable lien, enforceable against subsequent grantees who acquired the title with notice of the same.

Appeal from Polk District Court.—HON. LAWRENCE DEGRAFF, Judge.

THURSDAY, MARCH 7, 1912.

ACTION to establish and foreclose liens. Two actions were brought by the same plaintiff against different defendants. They were so related in their facts that they were consolidated by agreement and tried together. There was

a decree for the plaintiff in both actions, and the defendants have appealed.—*Affirmed.*

J. A. Merritt for appellants.

George E. Brammer for appellee.

EVANS, J.—These actions were originally brought as actions to foreclose purported mortgages. The plaintiff is a corporation. The alleged mortgages purported to have been executed by the plaintiff itself. They were executed to its own secretary as mortgagee, and the same secretary joined in the execution thereof as an officer of the company. They were executed by the president and secretary as officers of the corporation, but were acknowledged by the secretary alone. These mortgages purported to cover certain real estate then owned by the plaintiff company and which it later conveyed subject to the mortgages. The defendants are the present owners of such real estate.

The defendants appeared and answered the petitions respectively. The substance of each defense was an attack upon each mortgage as being inherently and absolutely void in its inception because of the facts already stated, and praying that the mortgages be decreed to be a nullity. It was also claimed that the mortgages were necessarily merged in the legal title while both were held by the plaintiff, and further that the assignment of the mortgages to the plaintiff corporation by its secretary amounted to a satisfaction and discharge thereof.

Being confronted with this defense, the plaintiff shifted its position and amended its petitions and set up the certain transactions, including a contract, which furnished the occasion and the consideration for the mortgages and the apparent liens which plaintiff seeks to enforce against the real estate. The substance of such amendment was that on August 14, 1909, the plaintiff

entered into a written contract of exchange of property with the Paul Land Company, whereby the plaintiff undertook to convey the property involved in this suit to the Paul Land Company subject to incumbrance of \$10,000. The property in question consisted of fifty acres located in or near the city of Des Moines. It consisted of two tracts known in this record as the "twenty-acre" tract and the "thirty-acre" tract. The contract of August 14th bound the plaintiff to convey this property to the Paul Land Company "by good and sufficient warranty deed with the general covenants of warranty, subject to the mortgage of ten thousand (\$10,000) drawing interest at the rate of 6 percent per annum payable annually and due in five years, but with the option to the owner of the said land to pay any multiple of one hundred (\$100.00) dollars of the said amount on any interest pay day, the said land to be otherwise free and clear of liens and incumbrances."

The contract also provided that the conveyances should be made of the respective properties on August 23, 1909. The mortgages sued on were executed on August 21, 1909. There was an existing valid mortgage of \$1,500 at that time on the "thirty-acre" tract. The plaintiff executed another mortgage thereon for \$4,500 to its secretary, and a mortgage of \$4,000 on the "twenty-acre" tract to the same mortgagee. This made a sum total of \$10,000 of incumbrance against the property. The last two named mortgages are those upon which suit was originally brought herein. The purpose of their execution was to conform with the contract entered into with the Paul Land Company on August 14. On August 23, 1909, the property was conveyed by the plaintiff to the Paul Land Company in pursuance of the contract of August 14th, and by an appropriate deed containing the following provision: "subject to mortgages to the amount of ten thousand (\$10,000) dollars at 6 percent annual interest due January, 1914, with optional payments also to taxes and interest now due."

The plaintiff contends that, by reason of this contract and its conveyance of the land thereunder, it was and is entitled in equity to a lien upon the property which is the practical equivalent of the mortgages, and that it is entitled to such liens regardless of the validity of the mortgages as such.

1. **EQUITABLE
LIENS: con-
tracts: sub-
stance rather
than form.**

The evidence in the case is brief and presents practically no conflict. It is undisputed that the plaintiff parted with its title to the said property substantially in the manner above stated. It appears, however, that the name of the Paul Land Company was not inserted in the deed as grantee. At its request no grantee was named in the deed at the time of its delivery by plaintiff, the intent being to permit the Paul Land Company to insert the name of a grantee at its own will. Later the Paul Land Company sold the property to one C. M. Gray and delivered to him the deed in blank which it had received from the plaintiff. Gray's name was later inserted in such deed as grantee. Gray sold the property to the defendant Allen. Allen sold the "thirty-acre" tract to the defendant Cora Lindley, and entered into an executory contract with the defendant Meadder to sell to him ten acres of the "twenty-acre" tract. Thus the legal title of the "thirty-acre" tract now rests in the defendant Cora Lindley, and that of the "twenty-acre" tract in defendant W. C. Allen. The arguments of appellants have been devoted chiefly to show the absolute nullity of the mortgages upon which this action was originally based. It requires no argument to convince us that the acknowledgments of the mortgages and the recording thereof were wholly ineffective to impart constructive notice. It is very clear also that the mortgagee could not have enforced the mortgages against the mortgagor without showing something more than their mere execution in the manner shown. Whether they are necessarily a nullity, however, as to the third persons regardless of notice or other equities, is a somewhat differ-

ent question. If we were to hold that the mortgages were a nullity as between the original parties thereto in the sense that they created no suable obligation as between mortgagor and mortgagee, it would not necessarily be determinative of this case. For the purpose of this case only, and without dealing directly with the question, therefore, we will treat the mortgages as a nullity in the sense that in themselves they created no suable obligation as between the parties thereto.

Turning now to the contract between the plaintiff and the Paul Land Company and the deed executed by plaintiff in pursuance thereof, the effect of these instruments was clearly in equity a reservation to the plaintiff of an interest or lien to the amount of \$10,000. This was the intent of the parties to that contract. A court of equity looks at the substance, and not at the form, and we see no reason why such provision could not have been enforced in a court of equity as between the original parties to such contract, even though through mistake, inadvertence, or oversight, no mortgages had in fact been executed.

We have frequently held that, where land is sold subject to an incumbrance, the land becomes the primary fund for the payment of such incumbrance. The incumbrance is presumed to have been provided for in adjusting the consideration. *Fuller v. Hunt*, 48 Iowa, 167; *Foy v. Armstrong*, 113 Iowa, 631; *National Bank v. Stone*, 97 Iowa, 185.

In this case, even though the mortgages be deemed a nullity as suable obligations, they may still be resorted to as items of evidence tending to throw light upon the intention of the parties.

It must be said, therefore, that the Paul Land Company accepted from plaintiff a conveyance of the property, which, by its terms, made the property the primary fund for the payment of \$10,000 with 6 percent interest payable on or before January, 1914. If, therefore, this suit had

2. SAME: convey-
ance subject
to mortgage:
presumption.

been brought against the Paul Land Company while it held the land, we think the plaintiff would be entitled to establish its equitable lien and foreclose the same regardless of the validity of the mortgages as such.

If the plaintiff had a valid equitable lien as against the Paul Land Company, it necessarily follows that it has the same lien as against subsequent grantees except so

3. SAME: equitable liens: notice.

far as they may be entitled to protection as purchasers for value without notice. The Paul Land Company sold to C. M. Gray and delivered to him the deed which it had received from the plaintiff. Gray's name was inserted in the deed as grantee, and he became a voluntary party to the contract. It is undisputed, therefore, that he had actual notice of the reservations. Gray sold to the defendant Allen; and Allen admits that he read the original deed from plaintiff and was present when Gray's name was inserted as grantee therein. The conveyances from Gray to Allen were also made subject to incumbrances. Allen sold the "thirty-acre" tract to defendant Cora Lindley by a conveyance which in express terms excepted "incumbrance of \$6,500, interest and taxes." On February 26, 1910, Allen entered into a written contract with the defendant Meadder for the sale of ten acres. Before this date, the original deed executed by the plaintiff had been duly filed and recorded. The contract with Meadder was wholly executory. The first payment was not to be made for the period of one year. This suit was begun in July of the same year. Meadder testified on the trial that he had conveyed to Allen an equity in other property of the value of \$2,100. But he did not disclose when he made such conveyance nor whether he made it before the beginning of this suit or afterwards. Indeed, it is not claimed in behalf of any defendant either in pleading or in evidence that he was a purchaser for value without notice. The theory of the defense is that the plaintiff never had a lien, and that the

question of notice was therefore immaterial. Some evidence has been introduced of the value of the property conveyed by each defendant as a consideration. It is claimed in argument that such consideration was the full value of the property received, but we find no evidence which gives us the slightest intimation of the value of the fifty acres or any part thereof. We are not disposed to encourage the practice of incumbering property beyond its value and then trading in apparent equities which have no value; nor the practice of setting a title afloat by passing a deed in blank from hand to hand. These practices are capable of much abuse and often result in gross frauds. A court of equity will scrutinize them rigorously and will not hesitate to brush them aside to prevent the perpetration of fraud. It is earnestly argued here that this is a case of that kind, and that the defendants have been defrauded through the improper practice of the plaintiff. We are unable to find a syllable of evidence that has the slightest tendency to prove that any fraud has been perpetrated upon anybody. Under the decree of the trial court, the plaintiff receives only what it bargained for originally with the Paul Land Company. Each defendant purchased with notice of the equities. If any defendant has been in any manner deceived or overreached, he has not testified to that effect.

We reach the conclusion that the decree of the trial court must be *affirmed*.

JOHN REED, Appellee, v. RACINE BOAT COMPANY, Defendant, E. A. SHERMAN et al., Garnishees, and NATIONAL LUMBERMEN'S BANK OF MUSKEGON, MICHIGAN, Intervener, Appellant.

Sales: TRANSFER OF TITLE: DELIVERY THROUGH CARRIER. Where the
1 seller of property consigned the same to his own order for shipment, taking a bill of lading and requiring a surrender of

the same properly indorsed before delivery of the property to the purchaser, and the bill of lading with a draft attached was forwarded for collection, the title and control of the property remained in the seller until payment of the draft and delivery of the bill of lading to the purchaser, although there was a direction on the bill of lading to deliver the same to the purchaser.

Same. Where property is consigned to the seller with instructions
2 to deliver the same to the purchaser upon payment of a sight draft and surrender of the bill of lading, the fact that the purchaser was to pay transportation charges did not constitute the carrier his agent, so that mere delivery of the property to the carrier was delivery to the purchaser, thus passing the title. Neither did the fact that the bill of lading bore a direction to deliver the property to the purchaser waive the express provision that the same properly indorsed should be required before delivery; nor did it constitute the purchaser the consignee of the shipment.

Same. Where the seller of property, consigned to his own order,
3 in good faith negotiated the bill of lading with a draft for the price attached, the legal title to the property vested in the purchaser of the bill of lading and draft, and this title could not be divested by the unauthorized act of the carrier in delivering the property to the purchaser without requiring a surrender of the bill of lading as provided therein, or by garnishment of the buyer by a creditor of the seller.

Garnishment: NOTICE TO GARNISHEE. A judgment against a gar-
4 nishee who had no notice of the garnishment is invalid.

Appeal from Superior Court of Cedar Rapids.—HON. C.
B. ROBBINS, Judge.

MONDAY, MARCH 11, 1912.

THE opinion states the case.—*Reversed and remanded.*

Redmond & Stewart for appellant.

Wm. G. Clark and *W. E. Steele* for appellee.

WEAVER, J.—The plaintiff in the main action seeks

to recover damages from the defendant boat company for breach of an express or implied warranty of a gasoline launch sold him by the latter. In aid of his said action plaintiff sued out a writ of attachment, and served notice of garnishment on E. A. Sherman and other parties. The defendant is a nonresident corporation doing business in Michigan, and the plaintiff and Sherman are residents of Cedar Rapids, Iowa. The original notice of the action was served or attempted to be served upon the defendant in Michigan on August 13, 1909, and it has entered no appearance in these proceedings. The garnishee, Sherman, responding to the statutory questions before the sheriff, answered, admitted that he had purchased a boat from the defendant, upon which account there was due a cash payment of \$229.90, and stating his readiness to pay that sum into court for the benefit of the party found entitled to it, should he be awarded possession and ownership of the boat. Thereafter the National Lumbermen's Bank of Muskegon, Mich., intervened, alleging that the boat ordered by Sherman had by the boat company been delivered to the carrier, consigned to the said company's own order at Cedar Rapids, and a bill of lading taken therefor, by the terms of which said shipment was to be retained in the possession of the carrier until the presentation and surrender of said bill duly indorsed by the boat company; that upon receipt of said bill of lading the company drew its draft or order upon Sherman for the cash payment due from him, and having attached the bill, properly indorsed, to said draft, the company negotiated and sold the same to the intervener, who at once forwarded it for collection to the Merchant's National Bank of Cedar Rapids, Iowa, with instructions to said bank to deliver the same to Sherman upon receipt of the money. The shipment was delivered to the carrier on July 8, 1909, and the bill of lading was issued as of that date, though not actually delivered until one or two days later. The delivery of the bill and draft

to the bank took place on July 10, 1909. The petition in this action was filed July 8, 1909. The notice of garnishment was served, according to the return thereon, July 10, 1909; but the officer, as a witness on the stand, was permitted to testify that the service was made on July 9th. It should also be said that, the boat having arrived in Cedar Rapids, the carrier delivered it to Sherman without presentation or surrender of the bill of lading, and that plaintiff thereupon caused said boat and the draft and bill of lading then in the hands of the Merchants' National Bank to be seized under his writ of attachment. The sheriff, having levied on the boat, left it in the possession of Sherman, taking his receipt therefor. The plaintiff denied the allegations of the petition of intervention, and the issues so joined were tried to a jury. At the close of the testimony the court withdrew the cause from the jury, entered a personal judgment against the boat company for \$245, with interest and costs, dismissed the petition of intervention, and ordered Sherman to pay the said sum of \$229.90 into court, to be applied upon plaintiff's judgment against the boat company. The intervener appeals.

I. The transaction between the boat company and Sherman is the subject of no material dispute. Sherman was a newspaper publisher, who, after correspondence with the company ordered a boat of a given description at the price of \$400, which by agreement between them was to be paid \$200 in cash and \$200 in advertising. To the order was added certain extra furnishings to the amount of \$29.90 to be paid for in cash. Sherman, it is conceded, was to pay the freight from the factory to Cedar Rapids. When the boat was ready, the company delivered it to the carrier, consigned to the company's own order at Cedar Rapids. The closing paragraph of said bill, which is the material feature thereof for the purposes of this case, is

1. SALES: transfer of title: delivery through carrier.

in the following words: "The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law, or unless permission is endorsed on this original bill of lading or given in writing by the shipper. Consigned to order of Racine Boat Manufacturing Company. Destination, Cedar Rapids, state of Iowa. Notify E. A. Sherman, at Cedar Rapids, state of Iowa. Route, Crosby care the St. P. at Mil. Description of article and special marks, one boat crated. Racine Boat Mfg. Company, Shipper, per H. S. Stanton. J. M. Mason, Agt." Upon the back thereof was also written: "Deliver to E. A. Sherman. Racine Boat Manufacturing Company, F. Caspar, Cash." So far as appears from the record, the draft and bill of lading were delivered to the intervener in the regular course of business and without any knowledge or notice of the action brought by the plaintiff.

It is argued for the appellee that, as Sherman was to pay the freight on the boat ordered by him, the carrier was his agent for the purposes of such transportation, and the delivery of the boat to such carrier was
2. SAME. in law a delivery to him, and his title to the property thereby became fully vested and could not be divested by the act of the company in negotiating the draft and bill of lading to the intervener.

It is further insisted that the indorsement upon the bill of lading, "Deliver to E. A. Sherman," had the effect to neutralize or waive the restrictive provisions of the bill, and convert the transaction into an open, unrestricted shipment direct to Sherman. The argument is unsound. The words "Notify E. A. Sherman" and "Deliver to E. A. Sherman" do no more than to designate the person who was expected to present the specific proof of his right to demand and receive the goods. They are in no manner inconsistent with the express stipulation that "the sur-

render of this bill of lading properly indorsed shall be required before the delivery of the property;" nor can it be said to substitute Sherman as the consignee of the shipment. The intent of the parties is not to be determined by a single isolated act, word or phrase; but reference must be had to the transaction and the writings as a whole. Thus examined, it becomes perfectly evident that it was the purpose and intent of the defendant company, by shipping the boat upon consignment to its own order and drawing and negotiating the draft with the bill of lading attached, to withhold the title to and control of the property until the cash payment was made, and that upon receipt thereof, and not till then, should the bill of lading be delivered to Sherman as the evidence of his right to demand and receive the boat from the carrier. It is immaterial whether there was any agreement upon the part of Sherman to pay a draft drawn on him for the admitted amount of the cash payment. It was the undoubted right of the seller to demand the money before delivering the boat, whether that delivery was to be made in Michigan or at Cedar Rapids. It was equally its right, had it seen fit so to do, to put the boat in charge of its own custodian, with instructions to take it to Cedar Rapids and demand and receive payment as a condition precedent to delivery, and we can conceive of no reason why, instead of this somewhat burdensome expedient, it was not at liberty to effect the same purpose by resorting to the familiar device of making the consignment to its own order, draw on the purchaser for the cash payment, and authorize the carrier to deliver the shipment to him upon his presentation of the proper evidence that such payment had been made. A delivery by the seller to the carrier of a shipment consigned to his own order is not a delivery to the purchaser, and it does not of itself effect a transfer of title to the latter. The record before us presents no evidence from which a finding that the boat was delivered by defendant to the garnishee,

or that the title thereof ever passed to him, can be sustained.

II. It is shown in evidence without dispute that on July 10, 1901, the defendant boat company negotiated the draft with bill of lading attached to the intervener bank and received full credit therefor upon

3. SAME.

its books, and that said papers have never been returned by the bank and said credit has been in no manner canceled or charged back to the company. Within a short time thereafter the company's account, including said credit, was on one or more occasions overdrawn. The draft and bill have never been returned from the collecting bank in Cedar Rapids, and are presumably still held under the attachment levied thereon in favor of plaintiff. The effect of the negotiation of a draft with bill of lading attached was recently considered by this court in *Bank v. Mowery*, 149 Iowa, 114. We there said: "The retention of the bill of lading and its delivery to the bank, to be delivered to the consignee upon payment of the price, is sufficient evidence of the purpose of the shipper to retain title until payment was made." In support of such holding numerous cases were cited. In the same connection we quoted with approval from *Greenwood's* case, 72 S. C. 450 (52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261), as follows: "As between the vendor and purchaser, the authorities leave no room for doubt that even if the bill of lading provides for delivery to the consignee, yet if the consignor draws for the price, attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve the title and right of possession until the draft is paid." To the same effect is the quotation from Freeman's note to *Chandler v. Sprague*, 38 Am. Dec. 419: "Where the bill of lading, whether drawn so as to make the goods deliverable to a designated consignee or to the shipper's order, is attached to or to accompany a draft for the price, which is

forwarded for collection, it is clear that the shipper reserves a *jus disponendi*, which prevents the passing of the title until the draft is paid."

Moreover, unless a contrary intention is made clearly to appear, the universal holding of the authorities is that the bill of lading of property delivered to a carrier is a symbol of the property itself, and its possession by the shipper, or by any other person to whom it is indorsed, is evidence of title in the holder. *Bank v. Mowery, supra*; *Ayres v. Dorsey*, 101 Iowa, 141; *Railroad v. Johnson*, 45 Neb. 57 (63 N. W. 144). According to all precedents the negotiation and delivery of the draft and bill of lading to the bank had the effect to vest the legal title to the shipment in the bank, and this could not be divested by the unauthorized act of the carrier in delivering the property to Sherman without surrender of the bill of lading; nor could the title or right of the bank be defeated by a garnishment of Sherman. He had none of the company's property in his hands. He owed the company nothing. Upon the admitted facts he was under no legal obligation whatever to pay for the boat until it was delivered to him, or at least until delivery was tendered him, and at the time of the garnishment this concededly had not been done. How his relations and obligations may have been affected by his taking possession of the boat without surrender of the bill of lading we need not consider, further than to say that, if he thereby made himself legally liable to pay the claim, such obligation was to the intervener, the holder of the bill of lading, and not to the boat company.

The record discloses no notice of any kind to the defendant of the garnishment of Sherman, and without such notice or appearance the court could not rightfully enter judgment against the garnishee. Code, section 3974. It is possible that service of some kind was made, or attempted; but we

4. GARNISHMENT:
notice to gar-
nishee.

must take the record as it is shown by the abstract, and none there appears.

For the reasons stated, the judgment appealed from must be reversed, and the cause remanded for further proceedings in harmony with this opinion.—*Reversed*.

O. C. BROWN, Plaintiff, Appellee, v. WARREN COUNTY
IOWA, Defendant, Appellant.

Attorneys: DISBARMENT: STATUTES: CONSTITUTIONALITY. The statute authorizing disbarment proceedings on the court's own motion, and the appointment of an attorney to draw up the accusation without the allowance of compensation, is not unconstitutional.

Appeal from Warren District Court.—HON. LORIN N.
HAYES, Judge.

FRIDAY, MARCH 15, 1912.

ACTION at law to recover attorney's fees against the defendant county for services rendered by the plaintiff, an attorney at law, in certain disbarment proceedings and under regular appointment by the court to such services. There was a demurrer to the petition, which was overruled. The defendant elected to stand upon its demurrer, and judgment was accordingly entered for the plaintiff, and the defendant appeals.—*Reversed*.

J. R. Howard and J. O. Watson for appellant.

O. C. Brown for appellee.

EVANS, J.—It is made to appear from the petition that in September, 1903, disbarment proceedings were instituted against one Mosher upon order of the district

court and, upon a like order, the plaintiff and others were appointed to take charge of the prosecution of such proceedings. In such proceedings the plaintiff performed services to the value of \$1,075. The appointment of the plaintiff was made under the provisions of section 325 of the Code Supplement, which is as follows: "The proceedings to remove or suspend an attorney may be commenced by the direction of the court or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it. If an action is commenced by direction of the court, the costs shall be taxed and disposed of as in criminal cases; provided, however, that *no allowance shall be made in such case for the payment of attorney fees.*" The defendant's demurrer is based upon the express provision "that no allowance shall be made in such case for the payment of attorney fees." Manifestly upon the face of the statute, the demurrer should have been sustained. We are met with the contention at this point, however, that the statute is unconstitutional, in that it requires the performance of labor without just compensation. It is argued that it is in violation of section 18, article 1, of the Constitution, which provides that "private property shall not be taken for public use without just compensation first being made." The learned trial court adopted this view.

In *Hyatt v. Hamilton County*, 121 Iowa, 292, it was held that the county was liable to the attorney for the value of services rendered in such a case. This holding was based in part upon the fact that the statute then in force required the services, and was silent upon the subject of compensation. The liability of the county was therefore found as matter implied from the statute. Similar reasoning was adopted in the case of *Hall v. Washington County*, 2 G. Greene, 473. The services involved in

the latter case were those rendered by an attorney under an appointment of the court to defend a pauper criminal. In the opinion of this court in that case it was said: "Whilst the statute requires the court to appoint counsel in a case like this, it is silent on the subject of pay for his services. It leaves that matter to be disposed of upon the principles of the common law." Since those cases were decided, the statute has been amended and appears now as section 325 above quoted. The appellee contends, as already stated, that the statute in its present amended form is unconstitutional, and there is some authority for this contention. *Carpenter v. Dane County*, 9 Wis. 274; *Dane County v. Smith*, 13 Wis. 585 (80 Am. Dec. 754). We find no other authorities directly in point upon this particular question which so hold. We do not feel called upon at this time to determine the question of the constitutionality of the statute. If it be unconstitutional as the appellee plaintiff contends, then it is ineffective to create in the appellee plaintiff an affirmative right.

The services for which the plaintiff claims his compensation were rendered under the call of this statute. This is a call for services to be rendered without compensation from the public treasury. If the Legislature had no constitutional power to call for such services without compensation, as therein provided, then clearly the plaintiff was not bound to perform such services. If the plaintiff had declined the appointment of the court on this ground, the court could have accepted the declination, and could have looked for a more willing appointee. If the court had refused to accept the declination, the plaintiff, appellee herein, could then have put the constitutionality of the statute to the test. He did not do so. He accepted the appointment without protest, and he must be held to have done so under the terms of the statute. It will not do to say that only the last clause of the statute is unconstitutional. The question involved at this point is the liability

of the county. It is clearly within the prerogative of the Legislature, both to provide and to limit the liability of counties. If the statute is unconstitutional, it is because it provides for a compulsory service without compensation from any source.

Some analogy to this case may be found in the case of *Samuels v. Dubuque County*, 13 Iowa, 536. That was a case against the county for attorney's fees for services rendered to pauper defendants in criminal cases. The statute under which the appointment was made provided for fees in specific amounts. The statutory fees for the services rendered by the plaintiff in that case amounted to \$25, but the plaintiff's services were worth \$110. He therefore sued for the value of his services. The holding of this court was adverse to him. In the opinion in that case it was said: "The inconclusiveness of this reasoning is too manifest to require a formal notice. It overlooks the fact that compensation in cases of this kind must be paid from the county revenue, the collection and disbursement of which are under the general control of the Legislature. It also overlooks the still more important fact that attorneys are officers of the law, whose fees, duties, and responsibilities may legitimately be the subject of Legislative regulation, like other officers, and, inasmuch as a class they enjoy certain special privileges under the law, something is justly expected from the *esprit de corps* of the profession in affectuating the policy of the government in giving to every pauper offender arraignment for trial the assistance of learned counsel." A similar question was involved in *Board of Supervisors v. Pollard*, 153 Ind. 371 (55 N. E. 87). This was an action for attorney's fees for services rendered under appointment in an action in behalf of a poor person in pursuance of a statute. We quote as follows from the opinion in that case: "The evident answer to this objection is that the attorney can not be compelled to perform the services, for the reason, at least, that the

statute providing for his appointment denies him compensation, and, if he does render them at the request of the court, he does so voluntarily, and with the knowledge that he is to receive no fee or reward therefor. Having undertaken the employment, voluntarily or gratuitously, he has no ground for a claim to compensation either from the poor person or the county. In our opinion the language of this statute excludes the idea that compensation shall be made the attorney from any source, and we think the courts have no power under it to tax fees, or distribute rewards, when the statute declares that none is to be expected." The plaintiff in that case relied upon a particular provision of the Indiana Constitution, being section 21 of article 1, providing in express terms "that no man's particular services shall be demanded without just compensation," and also upon the earlier case of *Webb v. Baird*, 6 Ind. 13, which is relied upon to some extent by the appellee in this case. If the constitutionality of our statute were put to the test as above suggested, there are cogent reasons of public and professional policy and duty which suggest themselves to the mind in support of the statute. The substance of these is that the privileges of an attorney, as such carry with them their appropriate and corresponding burdens. One of these burdens is to see that the proper standards of the profession be maintained. For a discussion of such question, see the following cases: *Lamont v. Solano County*, 49 Cal. 158; *Rowe v. Yuba County*, 17 Cal. 62; *Elam v. Johnson*, 48 Ga. 348; *Wright v. State*, 3 Heisk. (50 Tenn.) 256; *Arkansas County v. Freeman*, 31 Ark. 266; *House v. Whitis*, 64 Tenn. (5 Baxt.) 690; *People v. Niagara*, 78 N. Y. 622. We may as well say in this connection that we see no sound reason to hold the statute to be unconstitutional. It is our conclusion that in any event the plea of the unconstitutionality of the statute was not available to the plaintiff appel-

lee in this case, and that the learned trial court erred in overruling the defendant's demurrer.

For that reason the order must be, and it is, *Reversed*.

DEEMER, J., especially concurring. I prefer to place my concurrence wholly upon the ground that the statute is a perfectly valid exercise of legislative power. The attorney, having been directed by the court to perform the service, was in duty bound as an officer of court to do so, and I do not think he waived anything by obeying the order of court.

SUPPLEMENTAL OPINION.

TUESDAY, SEPTEMBER 24, 1912.

EVANS, J.—A reversing opinion was filed on the original submission. It was there held that the plea of unconstitutionality of the statute under consideration was not available to appellee, but this holding was not concurred in by all members of the court.

We are united in the view that the statute in question does not contravene any provisions of the Constitution, and that the case must in any event be reversed, under the express terms of the statute as amended. Code Supp. section 325. In view of our unanimity on this question, and our difference of opinion on the ground of reversal stated in the original opinion, we prefer to put the reversal upon the ground herein stated, and the former opinion is accordingly modified.

With this modification, the petition for rehearing is *overruled*.

**GUST FREDERICKSON, Administrator of the Estate of NUB
FREDERICKSON, deceased, v. IOWA CENTRAL RAILWAY
COMPANY, Appellant.**

Railroads: EVIDENCE: CONCLUSION: PREJUDICE. Where there was
1 evidence in a railroad crossing accident warranting a conclusion
that a certain engine was the one which struck deceased, and
there was no attempt to show it was not the engine, the testi-
mony of a witness that he examined an engine of defendant's
in the yards and that it came over the route of the accident on
that day, while in the nature of a conclusion was not so preju-
dicial as to require a reversal.

Same: CROSSING ACCIDENT: NEGLIGENCE: EVIDENCE OF CUSTOM. Evi-
2 dence of the general custom and habit of a decedent, as to his
exercise of care on approaching a certain railway crossing, is
competent in aid of the presumption that he was in the exercise
of due care, there being no eye witness to the accident.

Same: CONTRIBUTORY NEGLIGENCE: SUBMISSION OF ISSUE. Although
3 a railway crossing is so open that the approach of trains can
readily be seen under ordinary circumstances and an exercise
of ordinary care, still where there was a high wind and flying
snow at the time of the accident, sufficient at times to largely
obscure the vision, when taken in connection with the presump-
tion of due care and the evidence of decedent's usual care on
approaching the crossing, the question of contributory negligence
was properly left to the jury.

Same: DUTY TO STOP, LOOK AND LISTEN. One is not required by
4 law to stop, look and listen for approaching trains under all
circumstances when about to cross a railway track, but this duty
is governed by the existing conditions; and where the weather
conditions were such that had deceased done so it might have
been of no avail, his failure to exercise such a degree of care
was not negligence as matter of law.

Damages: DISREGARD OF INSTRUCTION: PRESUMPTION. It will not be
5 presumed that a direction to the jury to allow the fair reason-
able value of property destroyed, as shown by the evidence, was
disregarded by an allowance for property of which there was
no evidence of value.

Appeal from Worth District Court.—HON. J. F. CLYDE,
Judge.

FRIDAY, MARCH 15, 1912.

ACTION to recover damages for the wrongful killing of plaintiff's intestate and to recover the value of certain personal property destroyed at the same time. A trial to a jury resulted in a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

W. H. Bremner, F. M. Miner, and Kepler & Westfall (Geo. W. Seevers, of counsel), for appellant.

E. M. Sabin for appellee.

SHERWIN, J.—Plaintiff's intestate was killed by a train on a highway crossing, intersecting a railroad track and about two miles north of Northwood, Iowa, over which both the defendant and the Chicago, Rock Island & Pacific Railroad Company operate trains. The evidence fairly shows that the deceased started from Northwood for home between two and half past two o'clock in the afternoon, driving a single horse hitched to a sleigh. No witness who testified on the trial saw the accident; but a witness for the plaintiff, who lived near the crossing, found Frederickson fatally injured a short distance northwest of the crossing shortly after three o'clock. Frederickson was so badly hurt that he was unable to give any account of the accident, and he died within an hour after he was found. The horse that he had been driving was found dead and mangled some distance north of the crossing. His sleigh was broken, and flour and other groceries that he had bought in Northwood were found in the vicinity. It is conclusively shown that deceased was killed by a north-bound train. The only trains going north on the afternoon

in question, so far as the record shows, were a Rock Island passenger train, which passed Northwood before 2 o'clock, and a passenger train of the defendant, which was due to leave there at 2:32, and which did, in fact, leave Northwood about on time that afternoon. There was evidence tending to show that the engine that pulled the defendant's train in question into Albert Lea, Minn., that afternoon, bore unmistakable evidence of having been in collision with a horse, and with flour and other groceries, such as the deceased carried in his sleigh. We therefore think the evidence sufficient to warrant the finding that it was the defendant's train that killed plaintiff's intestate. Defendant was charged with a failure to give warning of its approach, and there was sufficient evidence to take that question to the jury.

A witness, residing in Albert Lea, Minn., testified over the defendant's objection that the question called for a conclusion that he "examined an Iowa Central engine that came north that day," and that it was No. 46. The witness was a policeman of Albert Lea, and testified that he saw the engine in the evening over toward the roundhouse, and that it was the only Iowa Central engine outside of the roundhouse. He did not testify that it was the engine that took the train in question into Albert Lea that afternoon, but from his testimony as to the condition of the engine, together with the other evidence, the jury was justified in concluding that it was the same engine that struck deceased. There was no evidence attempting to show that No. 46 was not the engine that pulled that particular train into Albert Lea, and while the answer of the witness was in the nature of a conclusion, we do not think it was so prejudicial to the defendant as to require a reversal.

A son of the deceased testified that he had ridden with his father over the crossing in question some twenty times or more during the five years immediately preceding

1. RAILROADS: evidence: conclusion: prejudice.

the accident, that he knew his father's habit and custom about looking and listening for trains, and that he was in the habit of stopping and looking and listening. Proper objection was made to this testimony and appellant now contends that it was error to receive it, because the habits and usual conduct as to a particular act are not admissible on the question of contributory negligence and because the witness had not shown sufficient familiarity with the habits of the deceased. The deceased was alone at the time he was killed, and, so far as the record discloses, no one witnessed the accident. In such cases, the presumption obtains that the deceased was exercising due care in approaching the crossing. This presumption is not conclusive, but is to be considered with the other evidence. In *Dalton v. Railroad Company*, 114 Iowa, 259, and in *Gray v. Railway Company*, 143 Iowa, 268, we intimated that cases might arise where it would be competent to show the general habit and conduct in such cases as bearing indirectly upon the question of contributory negligence. The general objection to such evidence is that it is too remote, and that a man may be generally careful in doing a particular thing and still be careless in the instance in question. But we are of the opinion that evidence of the general habit in using a particular railroad crossing is competent, at least where there are no eyewitnesses of the accident. It may tend to aid the presumption of self-preservation that arises in such cases, because a person is more likely to do what he is in the habit of doing under the same conditions. Such evidence is held admissible in New Hampshire; *Tucker v. Boston & M. R. R.*, 73 N. H. 132 (59 Atl. 943); *Davis v. Railroad*, 68 N. H. 247 (44 Atl. 388), and cases therein cited; and in Illinois, *Railroad Company v. Clark*, 108 Ill. 113; *Railroad Co. v. Bailey*, 145 Ill. 159 (33 N. E. 1089). The following cases also support the rule: *Railway Co. v. McNeil* (Ind. App.) 66 N. E. 777; *Rail-*

2. SAME: crossing accident: negligence: evidence of custom.

road Co. v. Spilker, 134 Ind. 380 (33 N. E. 280, 34 N. E. 218); *Craven v. Railroad Co.*, 72 Cal. 345 (13 Pac. 878); *Fitzpatrick v. Railroad Co.*, 128 Mass. 13; 1 Wigmore on Evidence, sections 92, 93; *Mathias v. O'Neill*, 94 Mo. 520 (6 S. W. 253). As bearing somewhat on the same question, see *Slossen v. Railroad Co.*, 60 Iowa, 215; *Lanning v. Railroad Co.*, 68 Iowa, 502; *Johnson v. Railroad Co.*, 77 Iowa, 666; *Shaber v. Railway Co.*, 28 Minn. 103 (9 N. W. 575); *Smith v. Clark & Whittling*, 12 Iowa, 32; *Stafford v. Oskaloosa*, 64 Iowa, 251.

It is said that the court should have held, as a matter of law, that deceased was guilty of contributory negligence; but we can not assent to the proposition. While the cross-

3. SAME: contrib- ing in question was so open that the approach
utory negli- of a train could have readily been seen by
gence: submis- the exercise of care, under ordinary circum-
sion of issue.

stances, the record shows that on the afternoon in question the wind was high and at times the air was so full of drifting snow that a person could not see far. What precaution the deceased may have taken when approaching this crossing can not be certainly determined. But he had used it frequently for many years and knew that it was dangerous to attempt to cross the track without exercising care, and the presumption that we have already referred to, in connection with evidence of the conditions of the weather at the time, was, we think, sufficient to take the case to the jury. *Lorentz v. Railway Co.*, 115 Iowa, 377; *Funston v. Railway Co.*, 61 Iowa, 452.

Instruction 10 is complained of, on the ground that no fact or circumstance was shown which would serve to excuse "the failure of the deceased to look and listen for

an approaching train." But the appellant is
4. SAME: duty to mistaken as to this. The deceased may have
stop, look and
listen.

stopped and looked and listened, and still have been unable to see or hear the train on account of the weather conditions shown. Nor is a person approaching

a railway crossing required by the law to stop, look and listen under all conditions. Such duty is always dependent upon the conditions existing at the time. See cases immediately *supra*. There was no error in the instruction.

Instruction 12 is criticised because the jury was told that, if it found for the plaintiff on his claim for damages to the horse, sleigh, and other personal property, the fair and reasonable value of such property, as shown by the evidence, should be allowed.

5. DAMAGES: disregard of instruction: presumption.

It is said that there was no evidence as to the value of the groceries that were destroyed by the collision, and hence the instruction was erroneous. If appellant's contention be true, the jury could not have allowed anything therefore under the instruction without disregarding it, and this we will not presume. It is a very small matter, involving but a few dollars at most, and we see no reason for modifying the judgment on account thereof.

We find no error for which the judgment should be disturbed, and it is *affirmed*.

JOHN ADAMS, v. CHICAGO GREAT WESTERN RAILROAD COMPANY and J. C. EVANS, Appellants.

Railroads: EJECTION OF PASSENGERS: INTOXICATION. The statute
1 authorizes railway companies to eject intoxicated passengers from their trains as a protection to the traveling public from the misconduct of drunken and disorderly persons; but in doing so they are not at liberty to use excessive force, or to knowingly imperil life or limb. In the instant case the conductor was justified in ejecting plaintiff, not only on the ground of intoxication but also because of refusal to pay his fare.

Same: EJECTION OF PERSONS FROM STATION. A railway company may
2 forcibly eject persons from its passenger stations, except within a reasonable time before, during or after the arrival and departure of its trains; but are not permitted to knowingly imperil the life or limb of such persons in so doing.

Evidence: ADMISSIONS. The admissions of a party to an action
3 should not be excluded because his attention was not called to them while testifying as a witness.

Railways: EJECTION OF PASSENGER FROM STATION: EXCUSE: EVIDENCE.
4 Proof that a station agent offered to take an intoxicated person whom he had excluded from the station home with him, did not relieve the company from liability for his injury from exposure, where the agent must have known that he was in such condition that he did not understand the offer. In the instant case the evidence is such as to require submission of the questions whether the agent offered to take the plaintiff home with him, or whether the agent knew that plaintiff did not understand the offer.

Appeal from Wright District Court.—HON. R. M. WRIGHT,
Judge.

FRIDAY, MARCH 15, 1912.

ACTION for damages resulted in judgment against both defendants, from which they appeal.—*Reversed.*

Carr, Carr & Evans and *Birdsall & Birdsall* for appellants.

J. W. Henneberry and *McGrath & Archerd* for appellee.

LADD, J.—In the afternoon of December 7, 1909, plaintiff was discovered lying on the floor in a box car in a train which had just reached Lehigh over a branch line of the defendant from Ft. Dodge to that place. The attention of the train crew being directed to him, he was assisted to the depot platform. Though he testified to having boarded a passenger car at Ft. Dodge, the conductor and brakeman denied having seen him there, and he offered no explanation of his exit from a passenger car to the box car in which he was found on the way. He remained at the depot in Lehigh until the train was ready to return

to Ft. Dodge, nearly two hours, and then boarded the passenger car. Upon demand for fare, he tendered a ticket from Ft. Dodge to Eagle Grove, which was declined, and though requested twice thereafter, failed and refused to pay the same, and was directed to leave the train at Evanston, the next station. This was about five o'clock p. m. of the same day. He did as required, and after standing on the platform a few minutes, entered the depot. After the agent, defendant Evans, had completed his work, about thirty minutes later, and was ready to go to his evening meal, plaintiff was required to leave the depot so that it could be locked and started on foot toward Ft. Dodge, about eight miles distant. After walking along the railroad track for some distance, he appears to have entered a corner, and to have slept there until about five o'clock the next morning. At that time he called at a house in Evanston where it was discovered that both his feet were frozen, and also two fingers of his right hand. Both feet and one finger subsequently were amputated. Two grounds of negligence are charged: (1) In ejecting plaintiff from the train at Evanston, knowing that he was intoxicated to such an extent as to be unable to care for himself, and that the weather was cold; and (2) in ejecting plaintiff from the depot and premises of the railway company at Evanston, knowing him to be in the condition stated, and unable to take care of himself, in the cold, and that there was no hotel or other place where he could obtain shelter from the inclemency of the weather.

I. That the plaintiff was in a state of intoxication when required to leave the passenger car at Evanston is undisputed. Section 2 of chapter 141 of the Acts of the Thirty-Third

General Assembly provides that "any conductor of a railway train or street car carrying passengers shall have the right to refuse to permit any person, not in the custody of an officer, to enter any passenger car on his train or street car in his

1. RAILROADS:
ejection of pas-
sengers: intoxi-
cation.

charge, who shall be in a state of intoxication; and shall have the further right to eject from his train at any station or from his street car at any regular stop any person found in a state of intoxication or drinking intoxicating liquors as a beverage, or using profane and indecent language on any passenger car of his train or any street car under his charge and for that purpose may call to his aid any employee of the railway or street car company." This conferred on the conductor ample authority to expel plaintiff from the train. He might have excluded him from the car when he undertook to enter it at Lehigh, had he elected to have done so, but the circumstance that plaintiff succeeding in getting aboard through the oversight of members of the train crew or for any other reason did not deprive the conductor of the right expressly conferred by this statute to eject him therefrom. Nor is a conductor in ejecting such passenger bound to select any particular station at which to do so. The statute in the plainest possible terms authorizes this to be done "at any station." Of course, this will not justify the use of excessive force in accomplishing what may be done, nor does such a statute afford any protection against the willful or wanton conduct of a conductor in ejecting a person even at a station. The condition of an intoxicated person doubtless might be such that to leave him to find his way even to the nearest house or the station would imperil his life or limb, and in that event the conductor would not be excusable in knowingly exposing him to such danger. *Roseman v. Railway*, 112 N. C. 709 (16 S. E. 766, 19 L. R. A. 327, 34 Am. St. Rep. 524). But this is not such a case. The plaintiff in leaving the car walked erect and reached the station, which was open, safely, and, though there was no hotel in the place, there were ten or twelve dwelling houses not far from the depot, and, in the absence of all proof, it is not to be assumed, nor was the conductor bound to assume, that a person even in plaintiff's condition then could not have

found shelter from the inclemency of the weather at the station, or in some of these dwellings. If the conductor was then aware that plaintiff was in a helpless condition, the record does not disclose the fact. A passenger testified that he sat straight in the seat and walked erect in leaving the car, but that she thought him kind of stupid, and that he did not seem to know what he was doing, for that, when the conductor refused the ticket from Ft. Dodge to Eagle Grove, he fumbled in trying to get his hand into his pocket. Undoubtedly this conduct was an indication of intoxication, but it alone should not be accepted as establishing helplessness.

Common carriers are required to exercise a very high degree of care in the protection of travelers being transported against the misconduct of drunken and disorderly persons, and the manifest design of this statute is to enable them to guard against the dangers incident to their conveyance by authorizing them to refuse such persons as passengers or after becoming such to expel them from their passenger coaches.

The plaintiff not only was intoxicated, but had refused to pay his fare. The defendant did not owe him the duty of carrying him gratuitously, and might ordinarily eject him at the first station reached. The record is without evidence from which it could rightly have been found that the conductor in doing so violated any duty owing plaintiff, and the first ground of negligence ought not to have been submitted to the jury.

II. The plaintiff in declining to pay his fare had ceased to be a passenger, and, when ejected, can not be assumed to have entered the depot for the purpose of taking a train.

Even if he did, however, the agent was not bound to keep it open until the next train passed through on the following day. The waiting room is for the accommodation of incoming and outgoing passengers, and not a place of resort for the

2. SAME: ejection of persons from station.

general public, and though one entering it not as a passenger or on business with the company is not to be regarded as a trespasser, yet, upon a request to leave, it is his duty to do so, whether disorderly or not, and upon his refusal to go it is the right of the agent to eject him, using such force as is reasonably necessary. *Johnson v. Railway*, 51 Iowa, 25; *Beeson v. Railway*, 62 Iowa, 173; *McDonald v. Railway*, 88 Iowa, 348.

As the plaintiff was not there on business connected with the company, the agent owed him no affirmative duty. In the absence of information to the contrary, he might assume that plaintiff was capable of taking care of himself, and was not bound before ordering him out of the depot on closing to ascertain his actual condition. If, however, the apparent condition of plaintiff was that of helplessness or of intoxication, such as to render him incapable of caring for himself, in view of the inclemency of the weather, and he was in such condition actually, then it devolved upon the agent to exercise such care, and take such precautions for his safety as an ordinarily prudent person would under like circumstances. In short, he was not charged with notice of his actual condition, save as this was apparent from his conduct or talk or appearance. And even though plaintiff may have been in a drunken condition, he was not bound to play the good Samaritan and minister to his wants; but, when the station agent required him to leave the depot and go out in the cold night, the duty or obligation immediately arose to exercise ordinary care in what he did. In other words, though the agent may have had the legal right to require the plaintiff to vacate the room he was occupying, yet, in doing so, he was bound to take into consideration the plaintiff's condition, and to exercise ordinary care for his protection. Undoubtedly the plaintiff's condition was due to his past misconduct, but this did not excuse the defendants when brought in relation with him from exercising due care in

availing themselves of their legal right with respect to his expulsion. They were required to exercise ordinary care in the immediate action in which they were engaged, and, if that action was calculated to create circumstances which would imperil human life or limb, they must guard against such contingencies as an ordinarily prudent person would under the circumstances.

In other words, though the defendants had the legal right to exclude persons from the depot, save within a reasonable time before, during, and after the arrival and departure of trains, in exercising that legal right, they might not do so in a manner to imperil the life or limb of persons who were in the depot. In *Depue v. Flateau*, 100 Minn. 299 (111 N. W. 1, 8 L. R. A. (N. S.) 485), the plaintiff, who was a stock buyer, called at the defendant's house to look at cattle, but, as it was late, proposed to remain overnight, and examine them more carefully in the morning. His request was refused, but he was invited to and did remain for supper. After eating, he was taken sick. Though this was known to defendants, they refused to permit him to remain overnight, put him in his cutter, and, though he was unable to drive the team, started it off toward his destination. After going about a half mile, he fell from the cutter, and lay in the snow all night, to his great injury, and the court held that a case was made out on which damages might be allowed, saying after quoting from *Union Pacific Ry. Co. v. Cappier*, 66 Kan. 649 (72 Pac. 281, 69 L. R. A. 516):

The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty, at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.

This principle applies to varied situations arising from non-contract relations. It protects the trespasser from wanton or wilful injury. It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, though it does not embrace those sentimental or social duties often prompting human action. 21 Am. & Eng. Ency. Law, 471; Barrows on Negligence, 4. Those entering the premises of another by invitation are entitled to a higher degree of care than those who are present by mere sufferance. Barrows on Negligence, 304. The rule stated is supported by a long list of authorities, both in England and this country, and is expressed in the familiar maxim, *Sic utere tuo*, etc. They will be found collected in the works above cited, and also in 2 Thompson on Negligence, 1702. It is thus stated in *Heaven v. Pender*, 11 L. R. Q. B. Div. 496: The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. It applies with greater strictness to conduct toward persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them.

The cases bearing on the proposition stated are collected in 69 L. R. A. 513. See, also, *Haley v. Railway*, 21 Iowa, 15; *Weymire v. Wolf*, 52 Iowa, 533; *Louisville, C. & L. Ry. Co. v. Sullivan*, 81 Ky. 624 (50 Am. Rep. 186); *Haug v. Railway Co.*, 8 N. D. 23 (77 N. W. 97, 42 I. R. A. 664, 73 Am. St. Rep. 727); *Louisville & N. Ry. Co. v. Ellis*, 97 Ky. 330 (30 S. W. 979); *Black v. Railway*, 193 Mass. 448 (79 N. E. 797, 7 L. R. A. (N. S.)

148, 9 Ann. Cas. 485). The principle is not different from that involved in the ejection of a person from a passenger train upon refusal to pay for transportation.

The agent required plaintiff to leave the depot at about five o'clock in the afternoon, walked up with him to the elevator nearby, then returned to the depot before going to supper. After the evening meal, he returned to the depot about one-half or three-quarters of an hour, and then called upon a sick person for about an hour and a half, and returned to the depot to put out the lights at about half past ten o'clock. It is not our purpose, nor is it necessary, now to determine what the defendants should have done in the exercise of reasonable care. All we do hold is that if from the evidence it appeared that the plaintiff was in such a drunken and sodden condition that he was unable to take care of himself, either by walking to Ft. Dodge, eight miles distant, as it is claimed he started out to do, or to obtain reasonable shelter from the inclemency of the weather, and if the defendants, knowing him to be in such condition, compelled him to leave the depot and thereby expose himself to the dangers of an extremely cold night, instead of allowing him to remain in the depot until it was finally closed for the night or longer or assisting him to some place where he might be sheltered from the cold and therein they failed to pursue the course which an ordinarily prudent man would have under like circumstances, then they are liable. The instructions of the district court were in harmony with the rules as stated, and we think were correct.

III. Some time after the accident the defendant's claim agent called upon the plaintiff, and asked him questions, which he answered, and these were taken down in shorthand, and subsequently transcribed by a stenographer. The plaintiff read over and signed the translation. Many of these answers were inconsistent with plaintiff's testimony on the trial, and the

3. EVIDENCE:
admissions.

transcript of questions and answers as signed by him was offered in evidence. An objection that his attention when a witness had not been called to portions of these in cross-examination, and that it was not proper for impeaching purposes, was interposed and sustained. As the transcript was offered as disclosing admissions by the plaintiff, a party to the suit, it was admissible as substantive evidence, and it was unnecessary to first direct his attention thereto. The ruling was erroneous.

IV. The agent, Evans, testified that, when plaintiff left the depot, he walked with him as far as the elevator, and that on the way he said to him: "You are a stranger to me. I don't know you, but you can go home with me. You can stay at my house. We have two beds that are not used—nobody sleeps in them at all. You are perfectly welcome to one, and it won't cost cost you a cent." And he went off. He said, "I can walk to Ft. Dodge, just as well as not." If this occurred and plaintiff understood the offer and declined it, then defendants did all required of them. If he did not understand, and the agent was aware he did not, then, of course, this tender would not relieve them from any liability otherwise incurred.

The plaintiff testified that he knew of nothing which happened from shortly after he had left Ft. Dodge until the following morning, so that whether he understood was fairly in issue, but it is said that there was no evidence tending to show that the agent might have been aware of this. Powers testified that the agent spoke to plaintiff four or five times in the depot, and received only a mumbling response of "wait a minute," and that he finally got him out of the depot by taking him by the collar. Ferguson testified that, after the agent came back from the elevator, he asked him what had become of the man, and the answer was that he did not know, guessed he had gone to Ft. Dodge, and said he told him the way up, and that

4. RAILWAYS:
ejection of pas-
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cuse: evidence.

there was no place to stay in Evanston; that the witness said it was a pretty cold night to have to be out in his shape, and the witness responded that he would not have the drunken pup around; that he insisted upon him going out of the depot, though he did not want to go, and argued with him; and that he told him several times to go, and finally took him by the collar and led him out. This evidence was sufficient to carry the issue to the jury both as to whether the offer was made, and, if made, whether the agent knew whether it was understood by the plaintiff. There are some other rulings complained of, but of a nature not likely to occur on another trial.

Because of the errors pointed out, the judgment is *Reversed*.

MARY VITTEGL, Appellee, v. JOSEFA VITTEGL and JOSEPH MARAK, Appellants.

Judgments: DIVORCE AND ALIMONY: EFFECT. The entry of a judgment against a married man, pending a suit for divorce in which his property was attached by his wife to secure her alimony, became a lien against his nonexempt real estate at the date of its entry; and the lien was unaffected by a decree of divorce, to which the judgment creditor was not a party, awarding the property to the wife subject to liens prior to her attachment.

Same: HOMESTEAD: ABANDONMENT: BURDEN OF PROOF. Where actual occupancy of a homestead had ceased by the wife before entry of judgment against her husband, the burden was upon her to show a definite and fixed purpose to return in order to preserve and maintain her homestead rights, and avoid the effect of the judgment.

Same. Where both the husband and wife left their homestead intending to return, but while absent the husband abandoned his family and went to another state, his agency for the family ceased at that time and his intent thereafter regarding the homestead was not controlling as to the wife.

Same. One not in the actual possession of a homestead but having a definite and fixed intention of returning and occupying the

same, does not abandon it by making a contract of sale with the intent of investing the proceeds in a new homestead when the sale is consummated; the intent to return not having been otherwise changed.

Real property: CONTRACT OF SALE: RESCISSION: FORFEITURE. The 5 provision in a land contract that if the title to the property can not be made good within a certain time in the judgment of a third person, the earnest money shall be returned and the contract canceled, is one for rescission and not forfeiture, and therefore the statute requiring notice of forfeiture is not applicable; and the mistaken claim of the purchaser and such third person that the title can not be made good except upon payment of a certain mortgage authorized the grantor to rescind.

Specific performance: RELIEF TO PARTY DENIED PERFORMANCE. Al- 6 though the purchaser in this case was not entitled to specific performance of the contract, the vendor having exercised a right of rescission, still as he had in good faith deposited money to pay the amount of a mortgage on condition that he have the same assigned to him, and the money was so applied to the benefit of the vendor, though without specific authority or assignment of the mortgage, the purchaser was entitled to a decree requiring the vendor to repay the amount or to subrogate him to the lien of the mortgage, on the ground that the money was used by mistake to discharge the same.

Appeal from Johnson District Court.—HON. R. P. HOWELL, Judge.

FRIDAY, MARCH 15, 1912.

ACTION to quiet title. It was brought against the defendant Josefa Vittengl as sole defendant. The petition was in the statutory form. The real purpose of the action, however, was to remove from plaintiff's title the cloud of an apparent lien of a judgment held by the defendant Josefa against the former husband of the plaintiff. The defendant set up such judgment, and asserted her alleged lien. Marak came into the case as an intervener. He set up a contract of purchase of the premises described in the petition from the plaintiff, and prayed specific performance. There was a decree for the plaintiff as against both

the original defendant and the intervener, and both of these have appealed.—*Modified; affirmed; remanded.*

W. J. Baldwin and Ed Sulek for appellants.

Crosby & Fordyce and Remley & Calkins for appellee.

EVANS, J.—We will deal first with the controversy as made between the original parties to the case. The property involved was formerly the property of the plaintiff and her former husband. It consists of eighteen acres of farm land and a half dozen lots in the unincorporated village of Shueyville, in Johnson county. It was actually occupied by the plaintiff and her husband from the spring of 1906 to the spring of 1908. Thereupon they leased the place to a renter for one year, beginning March 1, 1908. They moved to Cedar Rapids, eight miles distant, where the husband had obtained temporary employment. They left all their farm machinery upon the place, intending to return thereto, as contended by the plaintiff. Before the expiration of the lease, they renewed it for another year. The plaintiff and her husband were not living happily together. Some time before March, 1909, he abandoned her and went to California. There was one child of the marriage, aged about two years, and this was left in the custody of the mother. In March, 1909, she began an action for divorce against her husband, and caused a writ of attachment to issue therein, and to be levied upon the property in protection of her alimony. In September, 1909, she obtained a decree of divorce. This decree awarded to her the custody of the minor child, and the ownership of the real estate referred to, subject to liens existing prior to the date of her attachment. Some days before the decree in her favor was entered, a confession of judgment was duly filed against her husband, and in favor

of the present defendant Josefa Vittengl for \$624. This is the judgment over which the controversy has arisen.

The defendant contends that the judgment became a valid lien against the property as soon as entered, and that it has therefore continued as such lien ever since. To this contention the plaintiff's response is threefold. She contends: First. That the property was awarded to her by a decree of the court subject only to liens existing prior to her attachment. Second. That the confession of judgment was fraudulent and collusive between her husband and the defendant Josefa, and that it is therefore void as against her. She also avers that the defendant, Josefa, employed her attorney to appear for the defendant husband in the divorce proceedings for the purpose of delaying the trial, and thereby enabling her to obtain the confession of judgment, and to cause the same to be entered prior in time to plaintiff's decree of divorce, and that she is therefore bound by the provisions of the decree finally entered. Third. She also contends that the property in question was her homestead, and that she had never abandoned the same, notwithstanding her temporary departure therefrom, and that, therefore, the defendant's judgment never became a lien upon the property.

The defendant Josefa is the mother of Anton Vittengl, the plaintiff's former husband. The evidence does not warrant the contention that she appeared by attorney or otherwise, nor that she employed an attorney to appear for the defendant in the divorce case. Neither will the evidence warrant a finding that the indebtedness for which the confession of judgment was entered was fraudulent or collusive. The defendant Josefa had become a surety for her son on two promissory notes which she was compelled to pay after his departure. The first suretyship was incurred two or three years before the beginning of the divorce suit, and the second was incurred on January 18,

1909. She was therefore a *bona fide* creditor and was entitled to her judgment.

I. Disregarding the question of the homestead for the moment, we think it must be held, also, that the judgment became a lien upon the property if not exempt, as soon as entered, and that it was not divested by the mere decree of the court, in the divorce case to which the defendant Josefa was not a party. This point is ruled squarely in *Daniels v. Lindley*, 44 Iowa, 567.

1. JUDGMENTS:
divorce and
alimony:
effect.

We turn, then, to the homestead question. Inasmuch as the actual occupancy of the homestead had ceased in March, 1908, the burden was upon the plaintiff to show that there was a definite and fixed purpose to return in order to preserve the homestead character and maintain her homestead rights. *Maguire v. Hanson*, 105 Iowa, 215; *Conway v. Nichols*, 106 Iowa, 358; *Kimball v. Wilson*, 59 Iowa, 638; *Newman v. Franklin*, 69 Iowa, 244.

2. SAME: home-
stead: aban-
donment: bur-
den of proof.

It is shown by appropriate testimony that, when the parties left the homestead, they were intending to return to it. It is also fairly shown that this purpose continued on the part of the plaintiff at least down to November, 1909. Manifestly the husband abandoned such intention when he abandoned his family, and went to California. But his agency for his family ceased with the formation of his intent to abandon it. His intent from that point to abandon the homestead was therefore not controlling. And this disposes of the question whether his conduct in writing from California and offering to sell the place can be considered as an act of abandonment binding upon his family.

3. SAME.

On the 10th of November, 1909, however, the intervener, Marak, called upon the plaintiff at Cedar Rapids, and offered her a price for the place which she decided to accept, with the intention on her part to use the pro-

ceeds in the purchase of another homestead. A written contract was entered into on the same day
4. SAME. whereby the plaintiff undertook to sell, and Marak to buy, the property. This contract contained a provision for its rescinding in case the title could not be made satisfactory before March 1, 1910. This contract was not in fact performed, and the plaintiff returned to her alleged homestead about March 1, 1910, and has occupied the same ever since. The difficult question which has been argued by the parties is whether this contract of sale should be deemed as an abandonment of the homestead.

As already indicated, we have held that, in order to preserve the homestead character in the absence of actual occupancy, there must be a continuing, definite, and fixed purpose to return. When such purpose ceases, the abandonment becomes complete. There is much reason, therefore, for saying that, when a contract of sale is entered into by the owner when he is not in actual occupancy of the premises as a homestead, such a contract is inconsistent with a definite and fixed purpose to return. On the other hand, we have held repeatedly that the owner of a homestead may change his homestead, and that he may sell the old and acquire a new one without any interruption in his homestead rights, and that he is entitled to a reasonable time to accomplish such change. *Pearson v. Minturn*, 18 Iowa, 36; *Sargent v. Chubbuck*, 19 Iowa, 38; *Robb v. McBride*, 28 Iowa, 386; *Benham v. Chamberlain*, 39 Iowa, 358; *State v. Geddis*, 44 Iowa, 537; *Lay v. Templeton*, 59 Iowa, 684; *Cowgell v. Warrington*, 66 Iowa, 666.

The contention of appellee is that, when she decided to sell, such decision was with the intent to purchase a new homestead with the proceeds of the old, if her contemplated sale were finally consummated. Such intention to acquire a new homestead is not necessarily inconsistent with the previous intention to return to the old homestead. The

question is difficult in the sense that the intent to change from the old to the new homestead gives a certain quality of contingency to the purpose to return to the old homestead. Unless appellee's contention is good at this point, however, then there is no way whereby the owner of a homestead can safely dispose of it as such with the intent to purchase another homestead, unless he is in the actual occupancy of the old homestead. This would reduce the law to somewhat of an absurdity at this point. The law treats the right of homestead as a continuing one regardless of the change from the old to the new. If the plaintiff had purchased a new homestead on November 10th, the date of her sale contract, she could have claimed exemption for such new homestead against appellant's judgment lien. If, however, such judgment lien attached to the old homestead the moment that its sale was attempted, then the practical effect of such result would be to prevent the exchange altogether. If the homestead character was preserved up to the date of the contract of sale by reason of a definite and fixed purpose to return on the part of the appellee, then it was her homestead in every legal sense. And we think it must be said that she had as much right to exchange it at that time for a new homestead or to sell it with intent to purchase a new homestead, as though she were in the actual occupancy. The question at this point must usually be one of fact as to whether the purpose to return had ever lost its definite and fixed character before the intent to purchase a new homestead with the proceeds of the old was formed. In the case before us, there is much in the circumstances to corroborate the testimony of the appellee as to her intention, and some of these circumstances will appear in the other branch of this opinion.

There is another consideration that is quite conclusive in appellee's favor at this point. The appellant's judgment was not against her. She became the owner of the property by a decree of the court in the divorce action

in September, 1909. If the homestead character of the property was preserved up to that date, the appellant's judgment against the husband, Anton, was not a lien thereon when the appellee acquired the same. If it was not a lien on the property before the appellee acquired it by her decree, it could never become a lien thereafter. And this is so, even though appellee had abandoned her homestead thereafter. If we should hold, therefore, that the contract of sale of November 10th amounted to an abandonment of the homestead on her part at that time, it would be effective only to subject such property to the payment of her own debts, and not to those of her former husband. We reach the conclusion, therefore, that the appellee's plea of homestead right must be sustained.

II. We pass now to a consideration of the rights of the intervener, Joseph Marak. As already indicated, his contract was entered into November 10, 1909. The contract

5. REAL PROP-
ERTY: contract
of sale: rescis-
sion: for-
feiture.

was written upon an ordinary blank form of land sale contract making time of the essence of the contract, and providing for strict performance and forfeiture. The contract price was \$2,500 of which \$50 was paid down, and the balance of which was to be paid March 1, 1909. The contract also contained the following written proviso: "It is understood that the title of the grantor rests upon a decree rendered by the district court of Linn county, Iowa, in October, 1909, and that the title is to be approved by Ed Sulek, and if, in his opinion, the same can not be made good by grantor by March 1, 1910, then the said \$50 is to be returned and this contract canceled." Sulek was the attorney for the husband in the divorce suit and for the mother, Josefa, in the obtaining and filing of the confession of judgment. This contract proved a source of controversy. Within a month after the contract was entered into, Sulek examined the title, and furnished certain written criticisms thereof. We need only consider one for the purpose of

this case. Sulek held that the judgment of the appellant Josefa was a lien upon the property, and this contention has been maintained ever since by intervener, Marak, and by his attorney. Execution was issued under the judgment and levied upon the property, and the intervener bid at the execution sale. We are unable to determine from the record before us just what was done. It is contended by intervener that he purchased the land at execution sale under such judgment for the amount thereof. The amount of his bid, however, under some arrangement or direction was held by the sheriff to await the outcome of this litigation and no return of the execution was ever made. When appellee acquired the land, it was subject to two mortgages of \$1,100 and \$400, respectively, with considerable unpaid accrued interest on each. The intervener was claiming the property under his contract, and on March 2d entered into forcible possession of a part of it. He was ready and willing to pay the purchase price, but insisted upon paying the same upon the liens and included in his insistence the alleged lien of the aforesaid judgment. Whether such judgment was a lien upon the property has been the bone of contention between the intervener and the appellee. Because of such contention the appellee purported to rescind the contract of sale under the provision above quoted. She paid into court for the benefit of intervener the \$50 advance payment made by him, and declared a rescission.

This feature of the case has been argued by appellants on the theory that she had declared a forfeiture under the forfeiture provision of the contract. Appellants have therefore argued that the forfeiture was ineffective under the statute because no thirty days notice of forfeiture was given. There can be no controversy over this question as a legal proposition. The appellee does not claim to have declared a forfeiture, nor is she in any position where she could claim it, for want of proper notice. The provision of the contract which we have above quoted is not a pro-

vision for forfeiture. It provides only for a rescission and a putting of the parties *in statu quo* in case the title is not "approved by Ed Sulek." It is undisputed that the title was not approved by Sulek, nor could it be made satisfactory except by the payment of the judgment. According to our holding in the foregoing division of this opinion, the intervener and his attorney were not justified in this claim. Clearly, therefore, the contingency provided for in the contract existed on March 1, 1910, and for some weeks prior thereto. Either party then was entitled to rescind. It is argued by appellant that the option in such a case was with Marak. If that be granted, it was only an option to perform the contract, and waive his unwarranted objection to the title. This he did not do. The trial court was therefore warranted in treating the contract as rescinded and in awarding to Marak the return of the \$50.

III. The case has another complication. While the controversy was pending between Marak and the appellee, the holder of the second mortgage began a foreclosure

proceeding and Marak undertook to protect the title of himself and grantor as against further expense. He thereupon deposited in the office of the clerk of the district court

6. SPECIFIC PERFORMANCE: relief to party denied performance.

\$1,688.42 under conditions which are abstracted to us as follows: "Stating that Mr. Marak deposited \$1,688.42 with request to pay Clay Bowersox upon presentation of mortgage of amount due and interest, and to pay Vanchura, and balance to be paid Mary Vittengl, and also directing that upon Clay Bowersox accepting money of the mortgage to have it assigned to Mr. Marak." This amount was intended to cover both mortgages. Bowersox held the first mortgage. He also acted as agent to some extent for the holder of the second mortgage. Of the amount so deposited, Bowersox drew \$492 in payment of the second mortgage, and such mortgage was surrendered and canceled by the holder. Appellant Marak contends that this was done at the re-

quest and under the authority of the appellee, and that such act amounted to an acceptance on her part of the \$492 on the contract price, thereby confirming the contract. The deposit by Marak and the withdrawal by Bowersox was done after the commencement of this suit, and before the trial. The evidence does not warrant the claim that this was done under any actual authority from the appellee and the trial court properly so held. We think, however, that this circumstance should not have been ignored in the final decree. The dispute between the parties was *bona fide*. Marak acted in good faith in the deposit of the money. It is doubtful, at least, whether the terms of the deposit justified the clerk in paying out the amount. There is no question, however, about his good faith. He notified appellee's attorneys by letter. They sent the letter to Bowersox. Bowersox notified the appellee. Appellee notified Vanchura, her father, who in the meantime had become the owner of the second mortgage by purchase. Bowersox also notified Stansbury who had loaned to Vanchura \$300 to enable him to make the purchase of the mortgage and who had possession of the mortgage as security for such loan. Stansbury directed Bowersox to draw the money. This was acceded to by Vanchura. Bowersox thereupon did draw the money, and paid \$300 thereof to Stansbury and the balance to Vanchura. The net result of the whole transaction was that the plaintiff obtained the full benefit of the amount drawn by the satisfaction and discharge of a valid mortgage against her property. The conditions of deposit imposed by Marak were that the mortgage should be "assigned to him." This condition seems to have been overlooked. Bowersox also purported to act "for Mary Vittengl," the appellee. He also acted in good faith, though without direct authority. His action in her behalf was to her advantage.

We can see no reason in equity or good morals why she should not be required to pay the amount so applied

to her benefit and under her purported authority, or that intervener should be subrogated to the lien of the mortgage on the theory that his money was appropriated by mistake to the discharge of the mortgage. The decree as actually entered only required her to pay the sum of \$50, being the amount of advance payment made on the contract. We think this further condition should be imposed, and the decree will be modified accordingly. The case will be remanded to the lower court for final decree consistent herewith, with full power to take additional testimony upon this question if deemed necessary. We are not able to determine with certainty from the record before us whether the amount drawn was \$492 or \$432. It appears in both forms in the printed matter before us. The record is also very indefinite in some other respects in relation to this feature of the case. We deem it proper therefore to reserve jurisdiction thereof to the trial court and to remand it for such purpose.

To this extent the decree entered below will be modified and in all other respects affirmed.—*Modified; affirmed; remanded.*

ELLSWORTH COLLEGE OF IOWA FALLS, et al., Appellants,
v. EMMET COUNTY, J. C. LOVELL, Treasurer, et al,
Appellees.

Wills: TRUSTS: ESTATE CREATED. A devise of land to trustees, with
1 power of sale and direction to set aside a portion for the establishment, erection and the maintaining of a charitable institution, the balance to be paid to the trustees of a certain college as an endowment fund, passed the legal title to the trustees under the will, with the equitable ownership in the ultimate beneficiaries. By the devise in this case an active trust was created to which the statute of uses does not apply.

Taxation: TRUST PROPERTY: EXEMPTION. Generally all property held
2 under a testamentary trust is to be taxed to the trustee; but under our statute the bequest in this case to the educational insti-

tution as an endowment fund is exempt from taxation, while that portion of the bequest for the charitable institution was subject to taxation, in the absence of any showing of the nature of the institution when established.

Trusts: INTEREST OF BENEFICIARIES. Ordinarily the rents and profits and the increased value of trust property accruing before actual conversion go to the beneficiary.

Appeal from Emmet District Court.—HON. A. D. BAILIE,
Judge.

WEDNESDAY, APRIL 3, 1912.

Suit in equity to set aside and cancel a tax levied upon certain real estate in Emmet County, to enjoin the collection of said tax, and for other equitable relief. Decree dismissing the petition, and plaintiffs appeal.—*Reversed and remanded.*

Nagle & Nagle and Birdsall & Birdsall for appellants.

J. W. Morse for appellees.

DEEMER, J.—The case involves a construction of paragraph 2 of section 1304 of the Code Supplement as it existed when the taxes complained of were levied against certain real estate in Emmet county. That part of the section referred to, so far as material, reads as follows:

The following classes of property are not to be taxed:
... (2) All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations for public use and not for private profit, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred and sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such

24 *University of Iowa v. State of Iowa*

The first question presented is whether the lands in question are exempt from taxation under the provisions of the Iowa Constitution and the statutes of the State. The Iowa Constitution provides that "the lands of the State, and the lands of the State of Iowa, and the lands of the State of Iowa, shall be exempt from taxation." The statutes of the State provide that "the lands of the State, and the lands of the State of Iowa, and the lands of the State of Iowa, shall be exempt from taxation." The question is whether the lands in question are exempt from taxation under the provisions of the Iowa Constitution and the statutes of the State.

The first question presented is whether the lands in question are exempt from taxation under the provisions of the Iowa Constitution and the statutes of the State. The Iowa Constitution provides that "the lands of the State, and the lands of the State of Iowa, and the lands of the State of Iowa, shall be exempt from taxation." The statutes of the State provide that "the lands of the State, and the lands of the State of Iowa, and the lands of the State of Iowa, shall be exempt from taxation." The question is whether the lands in question are exempt from taxation under the provisions of the Iowa Constitution and the statutes of the State. The lands in question were owned by the University of Iowa at the time the taxes were levied and assessed. The University of Iowa is an institution of learning organized under the statutes of this State for literary, scientific, and educational purposes, with its principal place of business in Iowa Falls, in Harlan County. Admittedly it is such an educational institution as is referred to in the paragraph from the Code Supplement just quoted. The only question in the case, then is this: "Where the lands in controversy 'real estate owned by the college as a part of its endowment fund' at the time the taxes were levied and assessed?"

This inquiry can be answered only by reference to testator's will construed in connection with such allegations of the petition as may properly be considered, for the case was decided by the court below upon a demurrer to the

petition. The petition contained by reference a copy of the will, an order for the probate thereof, letters testamentary to E. O. Ellsworth and F. A. Gowan as executors, articles of incorporation of Ellsworth College, and certain amendments thereto. What are called the amended and substituted articles of incorporation adopted in July of the year 1907 name the following persons as trustees: "S. M. Weaver, F. D. Peet, E. O. Ellsworth, W. H. Woods, J. H. Carleton, Z. K. Hoag, William Weldon, John B. Parmelee, and Hattie A. Ellsworth." Who the original trustees may have been the record does not disclose. Coming now to the will we find the following provisions material to the proper determination of the case: After devising certain real estate, and personal property to his wife, children, and certain other relatives and making certain bequests to various charitable and eleemosynary institutions, testator made the following provisions: "(12) I give, devise, and bequeath to Ernest Orlando Ellsworth, John B. Parmelee and W. H. Woods all of Iowa Falls, Iowa, as trustees, to be held by them in trust." (Here follows the description of many tracts of land, including that in controversy.) The will then provides: "Said trustees are given full power and authority to sell said real estate for the best obtainable prices and to make conveyances therefor, and they are hereby directed to sell the same as soon as it can be done to reasonable advantage at not less than the following prices." (Here follows the description of the lands with prices affixed.) The will then reads: "The said trustees are directed to devote the proceeds from the sale of the above-described lands as follows:

First. Twenty-five thousand (\$25,000.00) dollars of the sum or sums received from the sale of said land shall by them be set apart for the purpose of building and maintaining a home for the aged at Iowa Falls, Iowa, said home for the aged to be under the control of five (5) trustees, of which my wife shall be one, the other four of

whom shall be residents of Iowa Falls, Iowa, and who shall in the first place be appointed by the trustees first above named and shall hold their office for the term of one (1), two (2), three (3), four (4) and five (5) years respectively, and their successors shall be appointed by the judge of the district court at a session of said court in Hardin county, and on their appointment, giving bond and qualification of said trustees, the twenty-five thousand (\$25,000.00) dollars of proceeds derived from the sale of said lands shall be paid to them and of said fund, and not to exceed ten thousand (\$10,000.00) dollars of said fund may be used in the erection of buildings and improvements upon the following described real estate. (This is followed by a description of the real estate upon which the home is to be located.) The will then proceeds:

It is my wish that the benefits of said home for the aged to be opened in the first instance to residents of Iowa Falls, Iowa, such residents always being entitled to precedence in the matter of admittance. Then, if the accommodations will permit, to residents of Hardin county, and lastly, to residents of other parts of the state of Iowa.

Second. From the remainder of the proceeds derived from the sale of said lands, I direct my said trustees to pay to the trustees of Ellsworth College of Iowa Falls, Iowa, for the sole use and benefit of such college as an endowment fund, and to pay from the proceeds derived from the sale of said land, incumbrances, if any, upon the said lands, also to pay incumbrances, if any, upon Ellsworth College except such as are held by me, and to pay the balance to the trustees of Ellsworth College as an endowment fund for said college, the income to be used for the support of the school, and I direct my executors to release all mortgages held by me against said Ellsworth College and to cancel and surrender the notes of said college held by me. The funds received from the sale of said lands and paid to the trustees of said college shall be invested in United States bonds, state or municipal bonds or first mortgages on farm lands in the state of Iowa or Minnesota.

A residuary clause is included in the will, and E. O. Ellsworth, L. E. Jones, and F. A. Gowan were named as executors. It will be noted that one of these, to wit, E.

O. Ellsworth, was also made a trustee under the will, and it is to be inferred perhaps, although not charged in the petition, that the three trustees named in the will are the same persons of that name who, with six others, constituted the trustees of the college. If that be true, no reliance is put upon that fact, however, and the claim made in the petition is that the property was devised to the trustees named in the will in trust for the college as part of its endowment fund. It is charged in the petition that, after the payment by the trustees of the money received from the sale of the lands to the trustees of the home for the aged to be established after testator's death, the remainder of the funds received from the sale of the lands were to be paid by said trustees to the trustees of the college for the sole use and benefit of said college and as an endowment fund; the income to be used for the support of the school. The petition further alleges:

That under and in pursuance of the terms and provisions of the said will of the said Eugene S. Ellsworth, deceased, the said trustees therein named, Ernest O. Ellsworth, John B. Parmelee, and W. H. Woods, accepted said trust, and on or about April, 1907, qualified as such trustees and took possession of all of said real estate, and have ever since been in possession thereof of said trustees under the provisions of said will. That under and by virtue of the provisions of said will and the probate and record thereof as hereinbefore set forth, said real estate became, constitutes, and is a part of the endowment fund of said college and to build and maintain at Iowa Falls, Iowa, a home for the aged, and has so been at all times since the probate and record of said will, and said real estate is held and administered as such endowment, and the rents and profits derived therefrom are devoted exclusively to the maintenance of said college.

These are only the relevant facts as gathered from the record, and the primary inquiry is: Was the land in Emmet county real estate owned by the college as a part of

its endowment fund at the time the taxes were levied against it? It is manifest that the devise was not to the college directly, nor to trustees of the college as such, and it is also apparent that the devise of the legal title is to trustees, who are directed to sell the lands at given minimum prices; and from the amounts so received to pay a given sum to the trustees for a home of the aged, and from the remainder of the proceeds derived from the sale he directed his trustees to pay the trustees of the college, for the sole use thereof as an endowment fund, the income, to be used for the support of the school, and he also provided that the funds to be paid to the trustees of the college should be invested in United States or municipal bonds or in first mortgages upon farm lands.

It is quite clear that in this neither the college nor its trustees secured the legal title to the lands or any part thereof under the will. The most that can be claimed is that the trustees named in the will held the legal title in trust for the college, and that in fact it was the equitable owner of the land. It is well settled that, under such a will as we have here, the trustees took the legal title, or, as some of the cases put it, the fee-simple title. See cases cited in 28 Am. & Eng. Ency. of Law (2d Ed.) page 925; *Welch v. Allen*, 21 Wend. (N. Y.) 147.

The trust is an active one, and the statute of uses does not apply. In other words, the statute does not execute the trust. *Newhall v. Wheeler*, 7 Mass. 189; *Wood v. Wood*, 5 Paige (N. Y.) 596 (28 Am. Dec. 451).

As a general rule, real and personal property held under a testamentary or other trust is taxable to the trustee or trustees, and not to the *cestui que* trust or beneficiary.

Goodsite v. Lane, 139 Fed. 593 (72 C. C. A. 281, 2 Ann. Cas. 849), and note; *Elliott v. Louisville*, 123 Ky. 278 (90 S. W. 990); *Dunham v. Lowell*, 200 Mass. 468 (86 N. E. 951); *Rich-*

2. TAXATION:
trust property:
exemption.

ardson v. Boston, 148 Mass. 508 (20 N. E. 166); *Trowbridge v. Horan*, 78 N. Y. 439; *Green v. Mumford*, 4 R. I. 313; *Catlin v. Hull*, 21 Vt. 152. These are the general rules everywhere announced, without reference to any statutory exemptions.

But it is claimed that the home for the aged yet to be created and Ellsworth College were and are the equitable owners, not only of the property, but of the income therefrom, and that as the property to which the college is entitled is expressly made a part of its endowment, it is exempt from taxation under the statute hitherto quoted. That statute does not require that the college be the owner of the legal title to the property. It says that real estate owned by an educational institution as part of its endowment fund shall not be taxed. The word "owned" is broad and undoubtedly comprehends an equitable, as well as a legal, ownership, and the question of exemption, so far as the interest of the college is concerned, depends primarily upon whether or not the college is the equitable owner of the property devised and of the income derived therefrom while the property is in the name of the testamentary trustees. Manifestly we think the income from the property, aside perhaps from such part thereof as might be necessary to take care of the gift to the home for the aged, belonged to the college; and it is equally clear that the college was the equitable owner of the property devised subject to the trust for the home for the aged yet to be created. It appears from the record that the income from the property has been paid to the college and that all parties have put this construction upon the will. These facts, while not controlling, are entitled to great weight.

Certainly is it true that the increase in the value of lands goes to the college. Indeed, it is the general rule that, under a devise of lands to a trustee or trustees to be converted into money for the benefit of a *cestui que*

3. TRUSTS: interest of beneficiaries.

trust, the rents and profits accruing before actual conversion is accomplished, pass to the beneficiary under the will. Lewiston, Trusts (12th Ed.) 1223; *Moncrief v. Ross*, 50 N. Y. 431; *Sargent v. Sargent*, 103 Mass. 297; *Lent v. Howard*, 89 N. Y. 169.

It is manifest that under the terms of the will no part of the income before conversion is to pass to the home for the aged. This income, as well as the proceeds of the property after conversion, with the income therefrom, are expressly made a part of the endowment fund of the college, and this fact gives color to the equitable ownership of the college in the lands devised to the trustees. By the terms of the will, the trustees are to convert the real property into money for a permanent endowment of the college, and, in determining the nature of the equitable ownership or title to the lands, a court of chancery regards that as done which is directed to be done. Of course, the doctrine of equitable conversion does not apply to revenue statutes and convert real estate into personalty or personalty into real estate; but in dealing with the subject of taxation and construing exemption statutes the doctrine of equitable conversion may be resorted to in order to ascertain the nature of the equitable ownership of the beneficiary. See, as supporting this view, *Gould v. Asylum*, 46 Wis. 106 (50 N. W. 422); *Dodge v. Williams*, 46 Wis. 70 (1 N. W. 92, 50 N. W. 1103).

By the devise in question the trustees were given the legal title to the land, and while the beneficiaries had no interest in the legal or equitable estate expressly devised to the trustees, yet the equitable interest must necessarily have vested in some one. In order to ascertain who the equitable owners are, the court must inquire for whose benefit was the trust created. That being ascertained, the person or persons who are to be the ultimate beneficiaries are regarded in equity as the equitable owners. *Pearson v. Lane*, 17 Ves. 101.

It is well settled, of course, that a trustee such as created by the will in question is not the holder of a beneficial interest. He holds the legal title merely to perform the duties imposed by the trust.

In *Montgomery v. Wyman*, 130 Ill. 17 (22 N. E. 845), the Supreme Court of Illinois said:

No matter where the legal title to the operation of the statute if the institution is the ultimate or beneficiary owner. Most usually the title is held by the society or corporation which manages and controls the institution of learning, but not necessarily so; for there may be no corporation or organized society, and yet be 'an institution of learning' in respect to which the ownership of property, within the true intent and meaning of the law, can be predicated. But in such case, it would seem, there must, in the nature of things, be a trustee or trustees, to hold the legal title to the property, in trust for the purposes and objects of the institution of learning. The idea of ownership of property can only be connected with that which we call 'an institution of learning' by means of the interposition of either a society, or corporation, or a trust. If the title is in the controlling corporation, or if it is vested in a trustee or trustees, for the objects to be accomplished through the instrumentality of the institution, in either event the property is, within the contemplation of the statute, the property of the institution of learning. [See, also, *Gerke v. Purcell*, 25 Ohio St. 229; *In re Norton's Ex'rs v. City of Louisville*, 118 Ky. 836 (82 S. W. 621)].

In the case last cited it is said:

While the beneficiary of the trust fund is not given the immediate care and control of it, it is the equitable owner of it, and it could not rightfully be diverted to any uses or purposes other than those designated by the testator. If the condition required it, the beneficiary could by appropriate proceedings rescue the fund from any misappropriation of it. It is the owner of the fund, though temporarily controlled by others. While Norton and Barr are designated as trustees under the will, still they are the trustees for the beneficial owner. They are accountable

to it for the management of the property and the execution of the trust. The practical effect of the provision of the will under consideration is that the fund is given to the orphans' home, but it is to be managed for it for the specified time by the trustees named by the testator. If the income from the property or from its proceeds were to go to another during the five years, then it would be very clear that the property or fund should be taxed under that period. When one is the equitable owner of property and is entitled to the income from it, he has the enjoyment of every benefit that could come to any one who might own the property. To hold that the property should be taxed because it is controlled by others than the trustees of the orphans' home for a specified period is giving effect to the shadow, and not the substance, of things.

In *Williston Seminary v. County*, 147 Mass. 427, 18 N. E. 210, the Supreme Court of Massachusetts said:

An ordinary *cestui que* trust has a property in a fund held for his benefit; he has a right and interest which he may vindicate in various ways. If trustees violate their duty, make improper investments, misuse or misappropriate the funds, the *cestuis que trustent* may bring them to account, and are the proper persons to do so. But especially in the present case the property held in trust is to all practical intents and purposes the property of the seminary. The legal title is in the trustees; but the whole beneficial interest, unless indeed the annuitants are to be taken into account, is in the seminary. It would be a strained construction of the statutes to hold that this fund is to be considered as property of the seminary for the purpose of taxation but not for the purpose of exemption. The more natural and reasonable construction is that personal property which, under the general tax laws, would otherwise be taxable to the enumerated institutions, shall be exempt from taxation. . . . For the purpose of taxation, it is to be deemed their property. They are the taxable owners. Nobody else can be assessed for it. In the present case, the seminary, as a body politic and corporate, stands as the person for whose future benefit the fund is held, and therefore, according to the method prescribed by the general provision of law, would be taxable

for it. But, under the exemption clause, its personal property is exempt from taxation.

The following cases are to the same general effect: *State v. Watkins*, 108 Minn. 114 (121 N. W. 390); *State v. Johnston*, 65 N. J. Law, 169 (46 Atl. 776); *Masonic Society v. City*, 201 Mass. 320 (87 N. E. 602); *People v. Wells*, 179 N. Y. 257 (71 N. E. 1126).

Following these rules, it is apparent, we think, that the lands were exempt from taxation, except perhaps to the amount of the devise to the home for the aged yet to be created. As to that institution, a different question is presented. The home has not yet been created, and no one knows what the nature of the institution will be when it is established. Moreover, there are no allegations in the petition which would exempt the property were it or any part of it owned by the home. The trustees were specifically directed to set aside from the proceeds of the sale of the land the sum of \$25,000 for the purpose of building a home for the aged at Iowa Falls, and the residue was given to the college as a part of its endowment. This home for the aged, although not yet created, was as much the beneficial owner of \$25,000 of the funds to be derived from the sale of the lands as was the college to the remainder, and there is no showing whatever which would justify an exemption of that amount out of the lands. If the devise could be so treated as to vest the equitable ownership of the entire property in the college with a charge against it to the extent of \$25,000, a different question would be presented. But the will will not bear such interpretation. The gift to the home was quite as specific as to the college, and each has an equitable ownership in the lands; the home to the extent of \$25,000, and the college to the remainder. No sound legal or equitable reason appears why the lands should be wholly exempt because the college is entitled to the larger share of the funds. Its equities are no greater than those of the home

for the aged, and neither the money nor the property given to the home is exempt under any statute to which our attention has been called. The result of the whole matter is that the lands were exempt from taxation in the hands of the trustees, save as to the amount given in trust for the establishment of the home for the aged, to wit, the sum of \$25,000. To that amount and to that only should the lands have been assessed. In other words, there should have been deducted from the total value of the lands assessed all in excess of \$25,000. As this was not done, but the lands were decreed to be assessable to their full value without any exemption the decree must be reversed, and the cause remanded for one in harmony with this opinion.—*Reversed and remanded.*

WEAVER, J., taking no part.

J. A. JOHNSON, Appellant, v. S. A. ROBERTSON, Defendant,
Appellee, CITY OF DES MOINES, and JOHNSON &
MILLER COMPANY, Interveners, Appellants.

Real property: LEASES: ENFORCEMENT. One not a party to a lease
1 of real estate, in connection with which there is a building restriction agreement, is in no position to enforce the agreement.

Same: MUNICIPAL CORPORATIONS: STREETS: ADDED WIDTH: RIGHTS OF
2 **CITY.** Under an agreement of the owners of property abutting on a street to add to the width of the sidewalk in front of the property and not to erect buildings thereon, with no intention to dedicate the same but rather to hold it for the convenience of the owners, the use of the strip by the public will be deemed referable to the agreement with no right thereto in the city, except such as the agreement may confer; and such use will not ripen into a title or claim by prescription.

Same: EASEMENTS: THREATENED INTERFERENCE: INJUNCTION BY TEN-
3 **ANT.** An agreement of the owners to add a strip of their abutting property to the sidewalk space, and not to build thereon, constitutes a covenant running with the land and binding upon subsequent grantees; and a tenant entitled to the use and bene-

fit of such an easement has such an interest therein that he may enjoin anyone threatening to interfere with that use.

Same: SPECIFIC PERFORMANCE. Specific performance of a contract 4 rests largely in the discretion of the court, and will be denied where enforcement would result in great hardship, not merely pecuniary loss; or where the party complaining has been guilty of laches, or has acquiesced in the doing of the thing of which he complains.

Same: BUILDING COVENANTS: RIGHTS OF TENANT. The owner of 5 property for the benefit of which he has made building restrictions can not deprive his tenant of the right to such restrictions.

Same: ABANDONMENT OF RIGHTS: EVIDENCE. The owner or lessee 6 of property, for the benefit of which building restrictions have been created, will not be held to have abandoned his right to enforce the same by permitting slight and immaterial violations of the agreement, so long as the right to enforce the same is of value to him, and such violations do not interfere with the substance of the agreement. In the instant case the showing is held insufficient to establish abandonment or waiver of the right to insist on the restrictions of a building covenant.

Same: ESTOPPEL. The fact that plaintiffs had used a small portion 7 of the strip of land in controversy not strictly in accordance with the building covenant, by erecting thereon temporary show cases with permission of adjoining owners, and with the understanding that they were to be removed at any time in case of protest, did not estop them from claiming the right to enforce the covenant against the erection of a permanent structure covering practically the entire strip.

Appeal from Polk District Court.—HON. LAWRENCE DE GRAFF, Judge.

WEDNESDAY, APRIL 3, 1912.

SUIT in equity to enjoin defendant Robertson from erecting a building or in any way interfering with the free use of a four-foot strip of ground along the north side of a certain lot abutting upon Walnut street in the city of Des Moines. The city of Des Moines and the Johnson & Miller Company intervened in the suit, each

making some claim to the strip of ground. Upon issues joined, the case was tried to the court, resulting in a decree dismissing plaintiff's petition and the cross-petitions of the interveners and plaintiff, and the interveners appeal.—*Reversed and remanded.*

R. O. Brennan, Carr, Carr & Evans, and O. M. Brockett, for appellants.

Howe & Lyon, for appellee.

DEEMER, J.—Walnut street in the city of Des Moines is one of the main business thoroughfares of the city. It runs west from the river and, as originally platted from the river to Fifth street, was eighty feet wide, and from Fifth street west was but sixty feet in width. F. M. Hubbell was a large owner of real estate on the south side of Walnut street between Fifth and Eighth streets, and at an early day proposed to the other abutting property owners on this street that the sidewalk be broadened from Fifth to Eighth street without changing the curb line. He took the matter up with one Clapp and other owners, and by paying Clapp either \$100 or \$200 secured an agreement from him and the other abutting owners between Fifth and Sixth streets to widen the sidewalk between these points. Thereafter he procured like agreements from the owners of property between Sixth and Seventh streets, and thereafter similar agreements among the property owners on the south side of Walnut street between Seventh and Eighth streets. Clapp set his building four feet back from the line, and, while other buildings were then on this four-foot strip when they were replaced by permanent structures, they were all set back four feet according to agreement. The various agreements were made some time prior to the year 1876, and every one abided by them for fifteen or twenty years. The property in question is between

Seventh and Eighth streets, and the agreement between the various interested property owners so far as material reads as follows:

Know all men by these presents, that we, William McClelland (unmarried), S. A. Robertson and Margaret P. Robertson, his wife, Elizabeth Dimmitt (widow), Charles H. Getchell and Rachael E. Getchell, his wife, all of the county of Polk and state of Iowa, for and in consideration of the advantages which will result to each and all of us who are owners of lots Nos. one (1) and two (2) and seven (7) and eight (8) in block No. two (2) of the original town of Fort Des Moines, now included in the corporate limits of the city of Des Moines, Iowa, do hereby mutually agree to and with each other and bind ourselves and appropriate, set apart and use for sidewalk purposes the following parcel of land, to wit:

A strip of ground four feet wide off the north side of lots Nos. one (1) and eight (8), in block No. two (2) aforesaid and running the whole length of said lots, and to that end we mutually agree to and with each other that in case we erect or cause to be erected upon said lots or any part thereof, any building or buildings after this date, will set said building four feet south of the north line of said lots, and upon the erection of such building or buildings, we will construct and thereafter maintain upon said strip of four feet of ground a good substantial sidewalk at the proper grade; and that said strip of four feet shall never be reclaimed for the purpose of erecting buildings thereon or be used for any other than sidewalk purpose except it be by the unanimous consent of all the owners of property in said lots Nos. one (1) and eight (8) expressed in writing, signed, sealed and acknowledged.

It is understood that said strip of four feet, or so much thereof as may be needed, may be used by the parties who own the property for stairways into their several basements, and for the display of goods, wares and merchandise; but it is not the intention of the parties hereto to dedicate said strip of ground to the city of Des Moines or to the public, but to hold it as private property, to be used as above stated and for our own convenience and profit.

S. A. Robertson, one of the parties to this agreement, is the defendant to this suit, and interveners Johnson & Miller Company are lessees of parts of lots 1 and 2 in block 2 of the city of Des Moines from Chas. Weitz. Weitz acquired title to that part of the property covered by the lease by certain *mesne* conveyances from one Dimmitt, who was a party to the agreement from which we have just quoted. The lease to the Johnson & Miller Company was made on September 1, 1906, for the term of ten years, and by the terms thereof the lessees were to use the premises for the conduct of a retail mercantile business, and for no other purpose. These premises were at that time, as now, covered by a one-story building, and this building abutted one immediately to the east, which was then, as now, owned by the defendant Robertson. Pursuant to the original agreement, the sidewalks were widened by the various property owners and made uniform through the blocks on the south side of Walnut street between Fifth and Eighth streets, and no permanent structures were allowed to encroach upon this four-foot strip save as will hereafter be noticed.

When defendant first constructed his building upon the lot now owned by him, the front was set back so as to leave this four-foot strip, but a step or approach to the building was with the consent of the board of public works of the city constructed upon this four-foot strip. This step was seven and three-fourths inches high and four feet wide and extended the full width of the building on Walnut street. This step remained there until he (Robertson) concluded to remodel his building some time in the fall of the year 1909, when he tore it out, and in place thereof was proposing to erect a large display window covering almost this entire four-foot strip, which window was to be fourteen or fifteen feet high, thirty-three and one-third feet wide, and four feet deep, save for an entrance into the store building near the center ten feet and nine

inches in width. Shortly after this improvement was commenced, plaintiff brought this action to enjoin the erection thereof. The city came into the case by intervention December 11, 1909, and the Johnson & Miller Company on January 30, 1911. Upon the presentation of the petition on October 14, 1909, to Hon. W. H. McHenry, one of the judges of the district court, he made the following order: "On reading the foregoing petition, it is ordered, this 14th day of October, 1909, that nine o'clock upon the 18th day of October, 1909, be fixed as the time for hearing the application for temporary injunction asked for in said petition, and that the said hearing be held at the equity courtroom in the courthouse of Polk county, Iowa, and the said defendant given notice of said hearing at least four days prior to said date."

The record also contains the following: "Said hearing was accordingly had, and at the conclusion thereof the court orally announced that an order should be entered for a temporary injunction as prayed; but no record of such order was made, and no such writ ever in fact issued."

The case came on for final hearing on March 15, 1911, and was finally disposed of on the 16th of that month, the decree being in favor of Robertson.

Plaintiff bases his right of action upon the lease hitherto mentioned, and claims that he is entitled to the injunction prayed because of the agreement made by the property owners in the year 1876. He makes no other claim, and it is manifest from the statement already made that he is not a lessee of the premises, and that he is in no position to ask for an injunction.

1. REAL PROP-
ERTY: leases:
enforcement.

The intervener city claims that the four-foot strip is a part of Walnut street acquired through dedication or by prescription, and that it is entitled to maintain this action to prevent the obstruction of the street. The Johnson & Miller Company as lessees from Weitz claims that it is

entitled to a decree restraining the erection of the structure on the four-foot strip by reason of the original agreement of the property owners, and for the further reason that the structure constitutes a nuisance in that it obstructs Walnut street in such a manner as to cause it special damages. This last proposition is bottomed upon the thought that this four-foot strip is either a public right of way that is a part of Walnut street, or a private way by agreement, and that in either event it is entitled to such a decree as will preserve its use either as a private or public way. Defendant Robertson interposed many defenses; among other things he claims (1) that plaintiff has no such interest in the controversy as entitles him to any relief; (2) that the city has no interest in the strip, either by dedication or prescription; (3) that the only right of the Johnson & Miller Company is a contractual one based upon its contract of lease, and that as lessee it has no right of action save against its lessor, and no right to an injunction restraining the erection of the improvement; (4) that the present owners of the building, the heirs of the Chas. Weitz estate, he (Weitz) being dead, were and are the contractors who were making the improvement for Robertson, and that for this reason they are estopped from claiming any relief against defendant; (5) that the original agreement with reference to the use of the four-foot strip has been abrogated by reason of material violations of the parties thereto and by mutual acquiescence; (6) that the remodeling of the building was in strict accord with the terms of the original agreement; (7) that by standing by and seeing the improvements made without objection the Johnson & Miller Company are estopped from claiming that they were not in accord with the original agreement; and (8) that in any event the Johnson & Miller Company being mere lessees is not entitled to any other order than will protect its rights during the term

of its lease, and as this expires soon it has no other remedy than action against its lessor.

As has already been observed, plaintiff has not shown himself entitled to any relief, and the trial court was right in dismissing his petition.

As to the city, we do not think it ever acquired any right to the strip, save under the original agreement. The use made of the strip must have been under this agreement and is referable to it; and no such showing is made of use in hostility to this agreement or to the rights or claims of the parties thereunder as would make this strip a part of Walnut street, either by dedication or prescription. It is fundamental, of course, that, whatever the use, it will be presumed to have been under the agreement and not in hostility thereto. And as there was no express dedication to the city none will be inferred from mere use alone. Again mere use which will be presumed to have been referable to this agreement will not ripen into a title or claim by prescription. Under well-established rules it is clear that the city has no cause for complaint. The only real questions in the case relate then to the issues between the Johnson & Miller Company and the defendant, Robertson. It is contended that this company is a stranger to the original agreement; that it was not made for its benefit; and that it has no right in any event to complain of a breach thereof.

It is true, of course, that it was not a party to the original agreement, but this agreement manifestly was a building or restrictive covenant, running with the land

(*Sexauer v. Wilson*, 136 Iowa, 357; *Evans v. Pier Co.*, 67 N. J. Eq. 315 (58 Atl. 191; *Id.*, 67 N. J. Eq. 620, 59 Atl. 1117); *City v. Pier Co.*, 62 N. J. Eq. 139 (49 Atl. 822)), and of course passed with the land into whose-soever's hands the title might pass. Had the Johnson &

2. SAME: municipal corporations: streets: added width: rights of city.

3. SAME: easements: threatened interference: injunction by tenant.

Miller Company received a conveyance of the land from their lessor Weitz, instead of a lease, there would be no doubt of their right to enforce the agreement or covenant by appropriate action even against a grantee of Robertson having notice of the agreement. Robertson was one of the parties to the original agreement, hence the question of notice to him is not in the case, and the fundamental proposition here is, May a lessee from one of the parties to the agreement—the owner of a chattel real, who holds part of the property covered by the original agreement for a specific purpose, to wit, for the conduct of a retail merchandising business—enforce this building agreement? Upon this fundamental and vital question we have not been cited to any authorities which seem to be directly in point. The proposition is not free from doubt, and in the absence of direct authority, although doubtless many cases may be found upon extended search, we shall be obliged to resort to general principles for its solution. Of course, if the action were for mere breach of covenant, and the tenant's possessory rights were not directly disturbed, no doubt no one but the owner of the land could complain; for when we say that certain covenants run with the land, we mean primarily that they follow the title, and that action may be brought for breach thereof by him who holds the title.

Ordinarily a tenant for years has no title to the land and he has no right to enforce any of the covenants made in any of the deeds which constitute the chain of title. But for some purposes a tenant is in privity with his landlord (*Allen v. Culver*, 3 Denio (N. Y.) 295; *Lincoln v. Burrage*, 177 Mass. 378 (59 N. E. 67, 52 L. R. A. 110); *Parker v. Nightingale*, 6 Allen (Mass.) 341 (83 Am. Dec. 632)), and may maintain an action against any one who interferes with his possessory right. If we find, then, that these building restrictions or agreements create an estate or easement in the land or appurtenances there-

to, then it would seem to follow that a tenant of one of the parties might bring action in his own name against even a stranger who was threatening or who proposed to deprive him of the use of this easement or appurtenance. The first inquiry, then, in the solution of this problem is the effect of such building restriction covenants or agreements; for, as has been intimated by learned writers, the mere fact that a covenant may be said to run with the land does not solve the problem. The effect of such agreements has been the subject of many decisions, and courts and text-writers have had some difficulty in assigning them to a proper place in our system of jurisprudence. A learned text-writer has thus stated the law on this subject:

Even in some of the jurisdictions where, as in England, the burden of a covenant does not run with the land, an agreement as to the use of land may, under certain circumstances, affect a subsequent purchaser of the land who takes with notice of the agreement; equity in such case enjoining a use of the land in violation of such agreement. As stated in the leading case on the subject, 'the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.' The person thus affected by the agreement as to the use of the land may be a purchaser, a lessee, or even, it has been decided, a mere occupant of the land. There is some difficulty in explaining this doctrine so far as it involves an enforcement in equity of rights which are denied at law, and in some cases in this country the right to relief in equity in such a case seems to be based, not on the English theory of relief against a purchaser with notice, but on the theory that, by the covenant, an easement is created. This latter theory is, however, itself unsatisfactory in some respects, and is insufficient to explain all the cases in which relief has thus been granted against an assignee of the land. (Section 348, vol. 1, Tiffany on Real Property.)

In England, an agreement will thus be enforced in

equity against a subsequent purchaser or occupant only when it is restrictive of the use of the land, and not when it calls for the performance of some positive act by the occupant thereof. In this country, occasionally, an agreement not restrictive in its nature has thus been enforced. In the great majority of cases, however, the agreement enforced has been restrictive. Thus, agreements not to use land for building, or for a particular business, or for other than residence purposes, are thus enforceable, as are agreements not to build within a certain distance of the street, or to erect no building of less than a certain cost, or of a style of construction other than that named. According to a few decisions, the agreement, even though restrictive, in order to be thus enforced against a subsequent purchaser, must 'touch and concern' the land in favor of whose owner the agreement is made, by tending to the physical advantage of such land, it being insufficient that it increases its value indirectly by preventing the use of the adjoining property for a competing business. In England and New York, however, a different view apparently prevails. The right to thus enforce an agreement against a subsequent purchaser on equitable principles is, at least in some jurisdictions, independent of the mode or incidents of its execution. It need not be a covenant—that is, an agreement under seal—and it is sufficient if it be oral, or merely inferred from certain representations made upon the sale of land. (Section 349, vol. 1, Tiffany on Real Property.)

The purchaser of a tract can enforce an agreement restrictive of the use of another tract made with the former owner of both tracts only if the agreement was originally intended to inure to the benefit of any such purchaser, or, in other words, was intended to benefit the land rather than the promisee personally. Consequently a vendee of a tract of land, seeking to enforce such an agreement against a vendee from the same person of an adjoining tract, must show that the agreement was so intended, and this he may do by evidence as to the situation and condition of the property and the surrounding circumstances. An intention that purchasers shall enjoy the benefit of the agreement is, it seems, invariably presumed from the fact that the lots purchased were laid off for sale as building

lots, with no intention on the part of the purchaser so laying them off to retain any portion of the property for his own enjoyment. According to the English cases, the restriction must have been actually entered into the subsequent purchase—that is, the purchaser must, as it were, have purchased the right to take advantage of the agreement. (Section 351, vol. 1, Tiffany on Real Property.)

Another writer has said:

The rights created by restrictive covenant and agreements are frequently spoken of as easements; and, while the method of creating these rights and the limits within which courts of equity enforce them differentiate them from ordinary easements, yet the fact that courts restrict them to a negative character, and demand, in order to fasten them upon land, that they must be imposed for the advantage of other neighboring lands, requiring in a word a servient and a dominant tenement, brings them into close analogy with true easements. Nor is the fact that they are created by covenant a negation of this character, for an easement may be created by words of covenant as well as by words of grant; and it is not necessary that the rights should be created at the time that the dominant or servient estate is conveyed. It has been denied, however, that these rights can satisfactorily be considered as easements, and courts of equity usually speak of them as negative or equitable easements, or simply as equities or amenities. (Am. & Eng. Ency. of Law, vol. 5, pages 4 and 5.)

Building restrictions and other limitations on the use of property of a character which the law permits to be attached to land in such a sense as to restrict the use of one parcel thereof in favor of another will be enforced in courts of equity upon equitable grounds, in favor of and against the parcels designed to be benefited or burdened by the restriction in whosoever hands the parcels may be, without regard to whether the restriction is a covenant running with the land, or even, it would seem, without regard to whether the right created can be properly considered in the nature of an easement, provided that the person in possession of the parcel subject to the burden of the restriction took it with notice thereof, either actual

or constructive. When a lot has been sold subject to such a restriction, the price is presumed to have been affected thereby, 'and nothing could be more inequitable than that the original purchaser should be the assignee being allowed to escape from the liability which he had himself undertaken.' . . . The vital question in these cases is not whether there is a covenant running with the land, but whether the restriction was imposed upon the servient estate for the benefit of the land in behalf of which it is sought to be enforced. Whether the restriction was so imposed, or was merely a personal contract for the benefit of the vendor, is to be determined, generally, by the fair interpretation of the grant or reservation creating it, aided, if necessary, by reference to the situation of the property and the surrounding circumstances. . . . The great majority of cases wherein these principles are applied are those where a tract or estate is sold in lots or parcels, and covenants are exacted from the several purchasers imposing restrictions upon the use of the lots sold in pursuance of a general plan for the mutual advantage of all the parcels. In such cases, the restrictive covenants entered into between the first purchasers and their common vendor may be enforced by the purchasers or their assigns, without regard to the priority of title between the parties. . . . In England the rule is well established that a court of equity will only enforce, in accordance with the principles laid down in this title, negative covenants and agreements, and will not enforce covenants to do positive acts relating to land or requiring the expenditure of money, thus drawing the line as to the enforcement of these restrictions as it would run where the rights created by them considered as easements. But in the United States equity has lent its aid to enforce agreements to do positive acts. (Am. & Eng. Ency. of Law, vol. 5, pages 9-15.)

In *Parker v. Nightingale*, 6 Allen, 341 (83 Am. Dec. 632), the Supreme Court of Massachusetts said:

A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, as exceptions or reservations out of a grant not

binding as covenants real running with the land. Nor is it at all material that such stipulations should be binding at law, or that any privity of estate should subsist between parties in order to render them obligatory, and to warrant equitable relief in case of their infraction. A covenant, though in gross at law, may nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, 'a right to an amenity' in the use of an adjoining parcel, by which his own estate may be enhanced in value or rendered more agreeable as a place of residence. Restrictions and limitations which may be put on property by means of such stipulations derive their validity from the right which every owner of the fee has to dispose of his estate either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied. So long as he retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally, and can be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him can not equitably refuse to fulfill stipulations concerning the premises of which they had notice. It is upon this ground that courts of equity will afford relief to parties aggrieved by the neglect or omission to comply with agreements respecting real estate after it has passed by *mesne* conveyances out of the lands of those who were parties to the original contract. A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate, of which he had notice when he became the purchaser. In such cases it is true that the aggrieved party can often have no remedy at law. There may be neither privity of estate nor privity of contract between himself and those who attempt to appropriate property in contravention of the use or mode of enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him. But

it is none the less contrary to equity that those to whom the estate comes, with notice of the rights of another respecting it, should wilfully disregard them, and, in the absence of any remedy at law, the stronger is the necessity of affording in such cases equitable relief, if it can be given consistently with public policy and without violating any absolute rule of law. These principles were fully explained and applied by this court in the recent case of *Whitney v. Union Railway*, 11 Gray (Mass.) 359 (71 Am. Dec. 715), and are constantly acted upon by the court of chancery in England and by the courts of this country exercising equity powers. *Mann v. Stephens*, 15 Sim. 377; *Tulk v. Moxhay*, 11 Beav. 571, and 2 Phillips R. 774, and 1 Hall De G. Macn. & Gord. 1, and 1 Kay. 56; *Piggott v. Stratton*, De G., Fisher & Jones, 33. . . .

This brings us to a consideration of the most important and difficult question raised by the demurrer, which is whether the present plaintiffs, or any of them, set forth in the bill any such claim or title as will enable them to enforce this restriction on the use and occupation of the premises in controversy as against the defendants. A satisfactory answer to this inquiry will, we think, be found in the fact, which is sufficiently apparent from the allegations in the bill that the purpose intended to be accomplished by the restrictions inserted in the deeds of the estate now owned and occupied by the defendants was for the benefit and advantage of other owners of lots situated on the same street or court. Indeed, it could have been designed for no other purpose. If we lay aside all the facts alleged in the bill which rest in parol evidence only, and look exclusively to the history of the title as shown by the deeds, the conclusion is unavoidable that the original grantors, in whom the title to the entire tract now owned by the several parties to this suit in different parcels was vested, intended, by limiting the use of the several lots and prescribing the kind of structures which are to be erected by the grantees thereon, to establish a permanent regulation and restriction by which to prevent each parcel from being appropriated to a purpose which might inure to the injury of any other parcel or render it less agreeable as a place of residence. By excluding

all erections for the purposes of trade, and appropriating each lot to a prescribed use as a dwelling house, the entire neighborhood comprised within the limits of the original tract laid out for a street or court was secured against annoyances arising from occupations which would impair the value of the several lots as places of residence. Thus a right or privilege or amenity in each lot was permanently secured to the owners of the other estates. That this restriction or limitation was not imposed by the original grantors for their own benefit or advantage, and can not be considered as personal to them, is manifest from the fact that they retained no right or interest in any of the parcels of land. The whole tract was conveyed by them. It does not appear that they retained the occupancy or ownership of any of the lots or of any adjoining estate by means of which they could derive any personal benefit or advantage from the restrictions. But, even if they had, it would not change the result; because by uniting in a scheme or joint enterprise for the division of the estate into lots or parcels on a street or court laid out by them, and annexing to the conveyance of each lot a restriction on its use, by the observance of which each parcel would be occupied for a similar purpose with every other, the legal inference is, in the absence of any evidence to the contrary, that the intention was to secure to each estate the benefit or advantage which might arise from the specific mode in which the adjoining premises were to be improved and occupied. The effect of such a restriction inserted in contemporaneous conveyances of the several parcels under the circumstances alleged in the bill, was to confer on each owner a right or interest in the nature of a servitude in all lots situated on the same street which were conveyed subject to the restriction. Thus it entered into the consideration which each purchaser paid for his land, either by enhancing its price in view of the benefit secured to him in the restraint imposed on adjoining owners or by lessening its value in consequence of the limitation affixed to its use. In this view of the case, it is quite immaterial to determine the precise legal nature or quality of the restriction in question. In strictness, perhaps, the right or interest created by the restrictions, being a qualification of the fee, did not pass out of the original

grantors, and now remains vested in them or their heirs. But, if so, they hold it only as a dry trust, in which they have no beneficial use or enjoyment, the entire usufruct being in their grantees and their assigns now holding the estates for whose use and benefit it was intended. Such being the case, then the latter are proper parties to enforce the restriction; and the former, not having any present interest in it, need not be parties to the proceeding. The same result would follow if the restriction be construed as in the nature of a covenant by each grantee with the other owners of estates on the court, or others holding under a similar restriction. . . .

Looking at the merits of the case as disclosed by the bill, it seems to us that the plaintiffs are entitled to maintain their bill to enforce the restriction by enjoining the use of the premises for the purposes for which they are alleged to be occupied by the defendant Loeber.

The same rule was announced in *Hubbell v. Warren*, 8 Allen (Mass.) 178; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359 (71 Am. Dec. 715); *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Tallmadge v. E. River Bank*, 26 N. Y. 105; *Green v. Creighton*, 7 R. I. 1; *Gibert v. Peteler*, 38 Barb. (N. Y.) 488. In the latter case it was said: "The action of courts of equity in such cases is not limited by rules of legal liability and does not depend upon legal privity of estate, or require that the party invoking the aid of the court should come in under and after the covenant. A covenant or agreement, restricting the use of any lands or tenements in favor of or on account of other lands, creates an easement, and makes one tenement, in the language of the civil law, servient, and the other dominant, and this without regard to any privity or connection of title or estate in the two parcels or their owners. All that is necessary is a clear manifestation of the intention of the person who is the source of title to subject one parcel of land to a restriction in its use for the benefit of another whether that other belong at the time to himself or to third persons, and sufficient language to

make that restriction perpetual." The English cases seem to be to the same effect: *Western v. McDermott*, L. R. 1 Eq. Cas. 499; *Coles v. Sims*, 5 De G. McN. & G. 1; *Piggott v. Stratton*, 1 De G. F. & Jones, '33; *Tulk v. Moxhay*, 1 H. & Tuells, 105; s. c., 11 Bevan, 571.

From these decisions it will be observed that these building restrictions or agreements, particularly where negative in character, create equitable easements, amenities, or servitudes, and that they may be enforced by any one interested in the property without regard to privity either of contract or estate and no matter whether the covenant may be said to run with the land or not. It follows, then, that a tenant who is entitled to use this easement may bring a suit in equity to enjoin any one who is threatening to interfere with that use.

II. The Johnson & Miller Company having the right to sue to protect itself in the right to the free use of the property with all its amenities and appurtenances, we are

4. SAME: specific performance. next to inquire whether any of the special defenses pleaded have been established.

Among other things it is said that the right is an equitable one which will not be granted as of course, but only because there is such a showing as in good conscience entitles it to the relief claimed, and that there has been no abandonment of the right to enforce the agreement; no laches and no such acquiescence in what has been done as to deprive the tenants of their right to exact compliance with the covenants.

It is true, of course, that the specific performance of such contracts like those relating to contracts affecting real estate in general rests largely in the sound discretion of the court, and if the defendant will be subject to great hardship, or the consequences would be inequitable, relief will be denied. *Columbia College v. Thacher*, 87 N. Y. 311 (41 Am. Rep. 365); *Conger v. New York R. R. Co.*, 120 N. Y. 29 (23 N. E. 983); *Parker v. Nightingale*,

supra. But mere pecuniary loss to the defendant from a specific performance of such a restriction will not prevent a court of equity from enforcing it. *Hall v. Wesster*, 7 Mo. App. 56.

Of course the party complaining must not be guilty of laches, nor may he be in the position of having acquiesced in the breach. *Payson v. Burnham*, 141 Mass. 547 (6 N. E. 708); *Jackson v. Stevenson*, 156 Mass. 502 (31 N. E. 691, 32 Am. St. Rep. 476); *Whitney v. Union R. R. Co.*, 11 Gray (Mass.) 367 (71 Am. Dec. 715); *Ware v. Smith*, 156 Mass. 186 (30 N. E. 609).

But a landlord, having leased the property, can not after the execution of the lease deprive his lessee of the benefits of the covenants. *Piggott v. Stratton*, 1 De G. F. & J. 33 (6 Jur. (N. S.) 129).
 5. SAME: build-
 ing covenants:
 rights of
 tenant.
Raynor v. Lyon, 46 Hun (N. Y.) 227;
Landell v. Hamilton, 177 Pa. 23 (35 Atl. 242).

There is nothing in the case to show that the Johnson & Miller Company ever acquiesced in the breach of the agreement since it became a tenant of the property, and it commenced its suit against the defendant, or the action was brought by one of the members of that corporation, before Robertson had completed his improvement. This was the only breach which in any measure directly affected the property which they have leased. They have also pressed the suit with sufficient diligence, and should not be held guilty of laches.

The defendant also relies upon an estoppel due to the fact that one or more of the heirs of the Weitz estate was the contractor who had the building of the encroachment complained of, and that by reason of having part in this work, they not only estopped themselves, but also their tenant, from claiming a breach. To this there are two answers: In the first place, having rented the property to the Johnson-Miller Company, they could not destroy the equitable easement in their favor by conduct, and in

the next place there was no such showing of acquiescence on the part of any of the heirs of the Chas. Weitz estate as would amount to an estoppel. Indeed, there is nothing to show that the contractors who did the work for Robertson were any of them the heirs of the Weitz property.

The main defense relied upon, however, is abandonment or mutual abrogation of the agreement by the parties thereto or their privies. Of course there may be such con-

6. SAME: abandonment of rights: evidence.

duct upon the part of the parties to the agreement or their grantees as would amount to an abandonment. This is established by a long line of authorities commencing with the celebrated case of *Duke of Bedford v. Trustees of the British Museum*, 2 Mylee & Keene, 552, and running down to *Hensley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164 (50 Atl. 14; s. c., 63 N. J. Eq. 804, 52 Atl. 1132), and perhaps later cases. There is a conflict in the cases as to what will amount to an abandonment which is pointed out in the comprehensive note to *Brown v. Huber* (Ohio) 28 L. R. A. (N. S.) 705. That case also deals quite extensively with most of the propositions here involved, and we call especial attention to it because of the valuable note appended. There are also other annotations well worthy of attention in 1 Ann. Cas. 601, and 14 Ann. Cas. 760-1021.

Whether or not there has been a mutual abandonment is a question of fact rather than of law, although the better doctrine, we think, is stated in *Payson v. Burnham*, 141 Mass. 547 (6 N. E. 708); *Rowland v. Miller*, 139 N. Y. 93 (34 N. E. 765, 22 L. R. A. 182), and other cases to the effect that if the other erections did not interfere with plaintiff's rights he will not be held to have acquiesced when one of the parties to the agreement or his grantee proposed to do that which would result in indirect injury to his property. In other cases it is said that acquiescence in the breach of such a covenant by other grantees will not deprive a lot owner of the right to enforce a restric-

tive covenant so long as it remains of any value to him. *Lattimer v. Livermore*, 72 N. Y. 174.

Again, in *Hyman v. Tash* (N. J. Ch.) 71 Atl. 742, it is said in effect that violation of building restrictions will not prevent their enforcement if the violations are immaterial and such as do not prevent the general plan from being carried out. See, also, *Bowen v. Smith*, 76 N. J. Eq. 456 (74 Atl. 675).

The English cases generally hold that a person entitled to enforce a restrictive covenant may take no notice of violations not especially offensive to him without losing the right to enforce the restrictions in case of an especially offensive violation (*Knight v. Simmons*, 2 Ch. 294; *Osborne v. Bradley*, 2 Ch. 446; *Weston v. McDermott*, L. R. 2 Ch. Eng. 75), and the courts of this country have also adopted this rule. *Barton v. Slifer*, 72 N. J. Eq. 812 (66 Atl. 899); *Rowland v. Miller*, 139 N. Y. 93 (34 N. E. 765, 22 L. R. A. 184); *Brigham v. Mulock Co.*, 74 N. J. Eq. 287 (70 Atl. 185); *Bowen v. Smith*, 76 N. J. Eq. 456 (74 Atl. 675); *McGuire v. Caskey*, 62 Ohio St. 419 (57 N. E. 53).

In the latter case it is held in effect that plaintiff's submission to violations of a building line restriction, most of which were upon portions of the street remote from his premises, which violations did not substantially affect the enjoyment of his own property, did not operate as a waiver of his right to object to other encroachments by which such enjoyment would be materially impaired. In another case it was held that the erection of front steps over a building line and ornamental projections made without objection would not estop a party from enforcing a building-line agreement. *Tripp v. O'Brien*, 57 Ill. App. 407. See to the same effect and quite in point here *Bacon v. Sandberg*, 179 Mass. 396 (60 N. E. 936). Also the following to the same point: *Payson v. Burnham*, 141 Mass. 547 (6 N. E. 708); *Steward v. Finklestone*, 206 Mass.

28 (92 N. E. 37, 28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370); *Brigham v. Mulock Co.*, *supra*; *Morrow v. Hasselman*, 69 N. J. Eq. 612 (61 Atl. 369); *Waters v. Collins* (N. J.) 70 Atl. 984; *Adams v. Howell*, 58 Misc. Rep. 435 (108 N. Y. Supp. 945).

So much as to the law. Now the most that can be claimed for the testimony upon this proposition is that defendant erected the step to his building to which we have referred; that more than twenty-five years ago steps were built upon this four-foot strip leading to Foster's Opera House, which was upon a lot near to that occupied by the Johnson-Miller Company; that steps were also erected leading to the Masonic Temple upon this four-foot strip which is in the same block as the Weitz property; that the front of a drug store in the opera house building at the northwest corner of the block in which the property in question is situated was extended over and upon this step. It was also shown that showcases were permitted to remain upon this strip, and that at the east end near Fifth street a front has been extended over part of the strip. But the testimony also shows that almost without exception the walls of the buildings themselves and the projections which came to the street line, save the steps referred to, have been with reference to the line established by the agreement. This is the general rule as to property upon the entire strip. Under such circumstances we do not think there was either an abandonment or abrogation of the building restriction either by Johnson & Miller Company or by its lessor. None of the claimed encroachments in any way interfered with their use and enjoyment of this property, whereas the testimony shows that the construction complained of will be a serious loss to them in that it shuts off a view of their show windows by those who use the sidewalk. This showing is sufficient to entitle them to relief because it is an interference with the equitable easement to which they are entitled.

III. Lastly it is contended that the Johnson-Miller Company is not entitled to any relief because it has used the strip for other purposes than those contemplated by the agreement by maintaining a display case or cases upon part of the strip. These were shown to be small cases about eighteen by twenty-two inches, and something like four feet high, and did not, as we think, seriously interfere with other property on this side of the street. The maintenance of these should not, we think, estop the company from complaining of the obstruction which defendant is threatening to build or has built.

Again it was shown that these display cases were put up by permission of the property owners with the understanding that they were to be removed at any time there was a protest. They were temporary affairs, screwed to the wall by little brackets and were easily removed. Again the original agreement permitted the use of the strip for these purposes. We think there should have been a decree of injunction as prayed which would protect the Johnson-Miller Company during the term of their lease—not for all time for their lease expires in the year 1916, and this action is not for the owner of the fee. If he or they be content with the arrangement, well and good; but they can not after having leased the property deprive the lessor of the uses and benefits thereof. Whether or not the Weitz heirs will ever be entitled to an injunction, we need not now determine. The only decree which should be entered here is one which will protect the tenants in the full enjoyment of the property during the term of their lease. That this is the proper relief in such cases, see *Simper v. Foley*, 2 Johns & H. 555.

The decree must and it is reversed, and the cause remanded for one in harmony with this opinion.—*Reversed and remanded.*

N. E. HAYDON, et al., Appellants, v. JOHN WHITAKER,
Road Supervisor.

Highways: IMPROVEMENT: DAMAGE TO ABUTTING PROPERTY. While a road supervisor is clothed with some authority in determining the method of improving the highways, still his plans for their improvement must be within the scope of reasonable discretion. He can not destroy the ingress or egress to farm property, or turn the natural drainage of surface water to the injury of adjoining owners, but must use diligence in draining the same from the highways in its natural course. In the instant case the construction of a ditch in front of plaintiff's property unreasonably and unnecessarily interfered with his access to his premises from the highway.

Appeal from Polk District Court.—HON. JAMES A. HOWE,
Judge.

THURSDAY, APRIL 4, 1912.

ACTION in equity to enjoin the defendant as road supervisor from opening and maintaining a ditch along the highway in front of plaintiffs' premises so as to prevent or interfere with convenient access to said premises from said highway and from so interfering with the natural drainage of the surface water from plaintiffs' land upon the highway as to cause such water to run through such ditch in front of the plaintiffs' premises. The court entered a decree for defendant, and plaintiffs appeal.—*Reversed.*

John L. Gillespie, for appellants.

Thos. J. Guthrie and *Dale & Harvison*, for appellee.

McCLAIN, C. J.—The farm of plaintiffs, embracing

a quarter section of land, fronts on a highway to the south, and about midway between the eastern and western boundaries of the farm and near the highway are located the usual farm buildings surrounded by appropriate yards which slope slightly to the south and from which the surface water naturally passes upon and across such highway. The yard surrounding the house is about five rods in width east and west along the highway. East of this front yard is a garden of about the same width, and east of the garden is the barnyard. West of the front yard is an orchard and grove about twenty rods in width, and west of the orchard and grove is a field. At a point about twenty rods west of the southwest corner of the orchard and grove, there is a ridge or divide which is referred to in the record as the "west divide," and to the west of this divide the surface water from plaintiffs' farm naturally flows to the southwest, crossing the highway through a culvert near the southwest corner of plaintiffs' farm. There is testimony in the record tending to show that defendant's predecessor cut a ditch through this divide with the intention that the water coming from plaintiffs' farm west of the divide should be carried eastward along the north side of the highway to an outlet farther to the east, but that this ditch was filled up by the plaintiffs so that the surface water west of the divide is still allowed to pass to the south. It is not alleged in this action that defendant is proposing to reopen the ditch through the west divide, and we have no occasion to consider any question in regard to the former attempt to bring the water from west of this divide to the east along the highway in front of plaintiffs' residence. The complaint on behalf of plaintiffs is that in front of plaintiffs' front yard defendant has constructed along the north side of the highway a ditch from ten inches to two and one-half feet in depth where there was formerly a gradual slope from the yard to the traveled part of the highway, and is

threatening to extend this ditch to the westward so as to intercept surface water naturally flowing to the south across the highway and carry it eastward along the highway in front of plaintiffs' yard to some outlet further east.

Our statutes are unfortunately less specific as to what the road supervisors are to do in the improvement of the roads within their respective jurisdictions than they are as to how road taxes are to be collected and work on the roads is to be enforced, but they evidently contemplate that the road supervisor is to have some authority in determining how roads are to be improved, and, within the scope of a reasonable discretion, his plans for the improvement of their condition ought not to be interfered with. But the statute does specifically provide that he shall not "destroy the ingress or egress to any property or turn the natural drainage of the surface water to the injury of adjoining owners;" and that he shall "use strict diligence in draining surface the water from the public road in its natural channel." Code, section 1556. We have to determine in this case whether the ditch already constructed in front of plaintiffs' yard unreasonably and unnecessarily obstructs plaintiffs' ingress and egress, and whether the extension of this ditch further to the westward will divert surface water which would otherwise flow to the southward across the highway so as to cause it to flow eastward in front of plaintiffs' residence to their injury.

We are satisfied from the evidence that there was formerly a culvert across the road west of the southwest corner of plaintiffs' front yard intended to carry south across the highway the surface water from plaintiffs' orchard and grove, and from the portion of the field west of it which lies east of the west divide, and that this was the natural course of drainage. Had this culvert been maintained and kept open, we are satisfied that it would have disposed of the water without the necessity of digging a ditch in front of plaintiffs' yard in order to carry it along the north side of

the highway to a culvert which defendant has constructed south of plaintiffs' yard would no doubt have been necessary in order to round up the surface of the road and carry to the eastward toward the culvert just referred to the surface water from the yard and garden, but we reach the conclusion that there was no necessity for any such ditch as has been dug in front of plaintiffs' yard, and that the consequent interference with plaintiffs' access to their premises from the highway has been unreasonable and unnecessary; and that an extension of this ditch further to the westward so as to intercept the surface water naturally crossing the highway at the point where the old culvert was located would be improper.

Something is said in argument in behalf of plaintiffs with reference to an objectionable plan to extend the ditch along the north side of the highway still further to the east through another divide, spoken of as the "east divide," so as to make a continuous ditch to a country bridge located still further east. We find no complaint in the pleadings with reference to such plan and no reference thereto in the court's decree, and we therefore give the matter no consideration. It seems to be conceded that the culvert across the highway in front of plaintiffs' barnyard is properly located and constructed, and that the surface water from plaintiffs' front yard, garden and barnyard may be properly carried through it to the south.

The substantial complaint of the court's decree seems to be that it authorizes the construction and maintenance of a ditch along the north side of the highway in front of plaintiffs' yard, garden and barnyard, of sufficient depth to bring from the westward in front of these portions of plaintiffs' premises the surface water which would otherwise cross the highway to the west of the southeast corner of plaintiffs' front yard, and we think this complaint is well founded. The decree should therefore be so modified

by the lower court as to conform to the views herein expressed.

As the court authorized the construction and maintenance of a ditch unreasonably and unnecessarily interfering with the plaintiffs' access to their premises from the highway, its decree is *reversed*.

IOWA LOAN & TRUST CO. v. FREDERICKA KUNSCH, ET AL.,
E. T. MEREDITH and J. P. MAHER, Clerk and L. J.
KLEMM, Appellants.

Mortgages: FORECLOSURE: REDEMPTION BY LIENHOLDER. To authorize
1 redemption by a lienholder of land of his debtor sold under a
mortgage foreclosure, he must pay to the clerk the amount necessary to redeem and file the affidavit required by the statute, stating the nature of the lien and amount due thereon; and failing to file the affidavit the clerk may treat the deposit as insufficient to effect redemption.

Same: DEPOSIT OF REDEMPTION MONEY. The statute requires an actual
2 deposit with the clerk of the amount necessary to redeem from a mortgage foreclosure and sale; a tender and offer to pay the same is not sufficient.

Same: WITHDRAWAL OF REDEMPTION MONEY. The withdrawal of a
3 deposit made with the clerk to effect redemption terminates any right of redemption based on the deposit: So that where the redemptioner withdrew his deposit on taking an appeal from the action of the clerk in denying relief, his right was lost, as the money was no longer subject to the order of the court.

Same: REVIEW OF CLERK'S ACTION: PROCEDURE. Code, Section 4057,
4 provides a summary method for presenting questions relating to the right of redemption to a court or judge; and the aggrieved party must raise the question as to his right to make redemption, and to require the clerk to accept his offer to redeem, in accordance with its provisions and not otherwise.

Appeal from Polk District Court.—HON. LAWRENCE DE
GRAFF, Judge.

FRIDAY, APRIL 5, 1912.

IN this special proceeding to determine whether L. J. Klemm, one of the defendants, was entitled to redeem from an execution sale under foreclosure of plaintiff's mortgage, the court held that such redemption could not be made, and from this ruling Klemm appeals.—*Affirmed.*

A. A. McGarry, for appellant.

W. B. Brown, for appellees.

McCLAIN, C. J.—The action in which the present auxiliary proceeding has been instituted was one brought by the plaintiff to foreclose a mortgage given to it by defendant Kunsch upon a certain described tract of land to which junior lienholders were made parties. A decree of foreclosure having been entered against Kunsch as mortgagor and the lienholders as defendants, there was an execution sale of the mortgaged property on March 12, 1910, to the plaintiff for the amount of the judgment. Within nine months after the date of the sale, one Meredith took an assignment of the rights of one of the lienholders made a party to the original action and attempted to effect redemption from the sale. After nine months and within a year from the date of the sale the principal defendant, Kunsch, executed a conveyance of the premises to one Klemm, who, on February 28, 1911, applied to the clerk of the court to redeem the premises from said sale, without payment of the amount of the claim under which Meredith had attempted to redeem, which application was refused in writing on the ground that redemption had already been made by Meredith. With reference to Meredith's attempted redemption, it appears that on the last day of the nine months' period allowed for redemption by creditors (see Code, sections 4045-4050) Meredith paid

to the clerk the amount necessary for redemption from the sale, and the clerk, considering the redemption sufficient, paid the money over to the mortgagee who had bought in the property. But Meredith did not on the day of depositing the money with the clerk file an affidavit such as is required by Code, section 4056. The record shows that, on the assurance of the officer that the affidavit might be filed within a day or two after the date of the deposit, the attorney for Meredith postponed the filing of the affidavit until the second day after the expiration of the redemption period.

We agree that the clerk might properly have refused to treat the deposit of the money without the filing of the required affidavit as sufficient to effect redemption

1. MORTGAGES:
foreclosure:
redemption by
lienholder.

and might have held the money on deposit until the court should determine, on proper application, whether the redemption was sufficient; but we are not entirely agreed as to the effect to be given in this case to the action of the officer in accepting the redemption without the filing of an affidavit until two days later, it appearing that the postponement was one sanctioned by the officer and in no way directly prejudicial to the right of redemption by the debtor or her assignee. As we reach the conclusion that the attempted redemption by Klemm was not sufficient on other grounds, it is unnecessary to determine whether he should in attempting to make redemption have included in the amount of his deposit a sum sufficient to cover the claim of Meredith.

Without regard to the sufficiency of Meredith's redemption, there are insuperable obstacles to the recognition of the attempted redemption of Klemm. On February 28th,

2. SAME: deposit
of redemption
money.

he made a written tender to the clerk in full redemption of the sheriff's sale of the sum of \$2,280.12, and asked the cancellation of the sale, and the clerk in writing refused this tender on the ground that redemption had been made by

Meredith and the money paid by him in making such redemption had been paid over to the execution creditor. This written refusal contained the recital "that no other objection is made whatever to such tender and offer, either to the amount or kind of funds offered." Thereafter, on March 3d, Klemm presented to the judge of the district court an application for an order on the clerk, reciting the making of said tender and the refusal of the clerk to receive the same, and asking that an order be made permitting the applicant to make full redemption from the sheriff's sale without regard to any pretended redemption theretofore made by any one whomsoever. On this application the judge entered an order for service of notice on Meredith, who appeared and objected to the application on various grounds, one of which was that appellant had not paid into the clerk's office a sufficient sum of money to cover the claim of Meredith; and another was that the applicant had not complied with the provisions of Code, section 4057, one of which is that the person claiming the right shall deposit the necessary amount with the clerk.

The printed record contains no showing that the amount necessary to redeem from the original sale was ever deposited with the clerk, and in the absence of such showing the judge properly refused to entertain appellant's application, for the statute evidently contemplates not merely a tender and offer to pay which might be sufficient in an action in equity, but an actual deposit of the amount necessary to make redemption. There is nothing in the record to indicate that if appellant had offered to deposit the amount the clerk would have refused to receive it. The refusal of the clerk to accept the tender and allow redemption was not a refusal to accept a deposit.

In a motion filed by appellee to dismiss the appeal (which has been ordered submitted with the case), it is recited and made to appear by certificate of the clerk that on March 11th appellant deposited in the clerk's office for

the purpose of redemption the sum of \$2,275.05, which sum
of money was paid back to the appellant at
3. SAME: with- drawal of re- demption money. his request on April 1st. Without regard
to the sufficiency of such deposit as
to time or amount, we must hold that appellant lost any
benefit thereof by withdrawing it on the day on which his
appeal was taken. The withdrawal of the deposit neces-
sarily terminated any existing right based upon the making
of the deposit with the clerk. •

In response to this motion of appellee, the appellant insists that the motion goes to the jurisdiction of the court and should have been made and served upon the appellant not less than ten days before the date assigned for the submission of the cause (rules section 33; 33 G. A. chap. 206), whereas the motion was not served until three days before the date on which the cause was set to be submitted. But we think the motion does not raise a question as to the court's jurisdiction, but presents only a reason why the appeal should be dismissed on the ground that appellant was no longer entitled to maintain his appeal. However this may be, if we should disregard the motion we should have no showing whatever before us that appellant ever made any deposit with the clerk of the amount which, according to his contention, was necessary to entitle him to redeem from the execution sale, and he was not therefore entitled, so far as this record shows, to have an order of the court under Code, section 4057, sustaining his right to make redemption. That section which provides a summary proceeding for determining whether an attempted redemption is sufficient and should have been recognized by the clerk contains the express provision that the money paid to the clerk in the attempted redemption shall be held by him subject to the order of the court; and, necessarily, if the applicant who is denied relief desires on appeal to have the order of the court reviewed to the end that the court should be ordered to hold the attempted re-

demption sufficient, the deposit must remain with the clerk so that when he secures a favorable determination on his application the money shall be still subject to the court's order.

To avoid the objections to the sufficiency of the steps taken by appellant to entitle him to relief in a summary proceeding under Code, section 4057, he now claims that

4. SAME: review of clerk's action: procedure. the remedy sought was not under that section but under the provisions of Code, sections 3831-3846, relating to motions and orders. Section 3843 provides that "a judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties." This is the only section of the chapter relating to motions and orders which indicates the nature of the subject-matter to which it relates. We are satisfied that the special provision of Code, section 4057, must be regarded as pointing out the specific manner for raising, before a court or judge in a summary way, the question relating to a right to redeem. In *Hawkeye Insurance Co. v. Maxwell*, 119 Iowa, 672, it was said that the method pursued in that case was not erroneous, and reference is made to section 3843. But it is to be noticed that the proceeding for redemption in the lower court in that case, although instituted under that section, had been transferred to the equity docket and tried as an equitable action, and it was in view of the final disposal of the case that the court held the method pursued to have been without error, and this language was used, "In view of the fact that the merits of the controversy between all parties were fully investigated and determined in the equity action it does not seem very material whether the order directing the sheriff to make a deed to the plaintiff was based upon proper proceedings or not, and we shall give the question but little attention." The case of *Kendig v. McCall*, 133 Iowa, 180, was one involving the right in equity to have set aside a sheriff's deed and to

have established in plaintiff the right to redeem from the sale in pursuance of which the deed was executed, and it was held that the plaintiff was entitled to equitable relief although he had not proceeded in accordance with the provisions of Code, section 4057. We reach the conclusion that the plaintiff, proceeding summarily by motion to raise the question as to his right to make redemption and to have the clerk accept his offer to redeem, must do so in accordance with the provisions of Code, section 4057, and not otherwise.

Even if under the sections relating to motions and orders above referred to the appellant was entitled to an order on the clerk, he certainly was not entitled to such order until he had complied with the statutory requirements including the payment into the clerk's office of the amount necessary to redeem (Code, section 4051), and as already indicated, if the appellant ever made a payment into the clerk's office for this purpose, he subsequently withdrew the sum deposited before he secured the right upon which he relied, and thereby defeated any attempt which he may have made to get a summary order.

The order of the lower court denying plaintiff any relief in the proceeding instituted by him is therefore *affirmed*.

COMMERCIAL NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
v. A. T. FLICKINGER, Appellant.

Negotiable instruments: COMPROMISE AND SETTLEMENT: EVIDENCE.

1 In this suit upon promissory notes the evidence is held insufficient to show that the same were included in a prior settlement between one of the joint makers and the payee.

Same: EXCLUSION OF EVIDENCE: PREJUDICE. Where a party claimed
2 payment of a note by another party jointly liable, a letter written by such party to his attorney in relation to a settlement between himself and the holder of the note and dictated in the presence

of plaintiff, was not admissible against it, in the absence of any showing that it was advised of the contents of the letter; and in this instance exclusion of the letter was not prejudicial, as it was only material on an issue which the court might properly have withdrawn from the jury.

Same: ADMISSION OF EVIDENCE. The admission of plaintiff's books 3 of account was harmless to defendant, where his own witness admitted the facts sought to be proved thereby.

Same: EXCLUSION OF EVIDENCE: PREJUDICE. The exclusion of an 4 exhibit showing a continuation of plaintiff's claim against a third party was not prejudicial, where such party admitted his liability to the extent shown in the exhibit.

New trial: NEWLY DISCOVERED EVIDENCE. Alleged newly discovered 5 evidence having no probative value is not ground for a new trial.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

SATURDAY, APRIL 6, 1912.

SUIT on two promissory notes. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

I. N. Flickinger and W. R. Green, for appellant.

H. L. Robertson, for appellee.

SHERWIN, J.—In March, 1907, this defendant, A. T. Flickinger, J. F. Record, Royal Hudspeth and C. E. Price, the cashier of the plaintiff bank, bought a large tract of land in Nebraska for \$6,000 in cash. Record had the money to pay for his one-fourth interest in the land, but defendant, Hudspeth and Price borrowed \$4,500 of the plaintiff bank to pay their part of the purchase price of said land, giving the plaintiff their joint promissory note therefor due six months from date. The title to the land

was taken in the name of Record, who held it in trust for his copurchasers. The note given to the bank by Flickinger, Hudspeth and Price, was renewed when it became due and several times thereafter. In January, 1908, a written agreement was entered into by Price, Hudspeth and Flickinger, whereby Price was relieved from again signing said note, but acknowledged that he was liable to the bank for one-third thereof. The note was then again renewed by Hudspeth and Flickinger, and subsequently Hudspeth's name was dropped from the note, because of his other obligations to the plaintiff and to meet the requirements of the bank examiner, and Flickinger alone gave his note for \$4,500. Flickinger paid the interest on \$3,000 thereof, either in cash or by separate note, and finally alone gave the note in suit on the 18th of January, 1909. Price paid the interest on the remaining \$1,500, and just before this suit was brought he credited the note with \$1,500, the amount for which he was liable on the land deal under their original agreement and the written agreement of January 8, 1908. The original controversy between Price and the defendant was whether defendant was liable to the bank on the note for \$3,000 or for only \$1,500, which, with the interest thereon, defendant was at all times ready to pay. This suit was the result of the controversy.

The only defense interposed by the defendant was that \$1,500 of the amount represented by the note had been paid to the bank by Hudspeth, through one Pierce, in May, 1907, and that in October, 1909, a full settlement between the plaintiff bank and Hudspeth was had in which the bank received satisfaction for said sum of \$1,500. A note of \$150, given by Hudspeth and this defendant, was also sued on herein, and the defendant also claims that it was satisfied in the settlement of October, 1909. The alleged payment of the \$1,500, through Pierce, grew out of the following transaction: Hudspeth and Pierce settled a lawsuit that had been pending between them, and in that

settlement Pierce became the owner of Hudspeth's share in the Nebraska land, and Pierce was to pay the plaintiff bank \$9,600 in cash or notes for Hudspeth's benefit, and which Hudspeth directed the bank, in writing, to apply on his notes. Before Hudspeth closed this settlement with Pierce, he went to the plaintiff bank and gave it three notes of \$3,200 each, which sum, with the exception of about \$100 which was paid to him in cash, represented renewals of notes then held by the bank. When the settlement was finally completed, Pierce gave the bank notes for \$9,600, which the bank applied as payment of the three \$3,200 notes but recently given it by Hudspeth, and surrendered said three notes, canceled, to Hudspeth, who has ever since retained them. The trial court submitted to the jury the question whether there had been a payment to the bank of \$1,500 on the defendant's note of \$4,500 at the time of the Pierce transaction, and the jury found against the appellant's contention. The court withdrew from the jury the question as to the satisfaction of said \$1,500 in the settlement of October, 1909.

In this settlement, Hudspeth gave the bank his note for \$13,853.12, which covered certain notes given by Hudspeth to the bank, with interest thereon, and certain indebtedness of Hudspeth to Pierce and others, a list of which was present and furnished the basis of such settlement. The \$4,500 note in suit was not included in the list of notes, nor in the other indebtedness that was considered in the settlement. After the settlement had been made and the new note given by Hudspeth, the following receipt was signed by Price for the bank: "Received of Royal Hudspeth note of \$13,853.12, in full payment of all claims, by account, or assignments of any kind, nature or description, to this date." We think the court rightly withdrew from the jury the claim of payment in the October settlement. It is clear that the parties did not intend to include this

1. NEGOTIABLE
INSTRUMENTS:
compromise
and settle-
ment: evi-
dence.

note herein. It is not signed by Hudspeth, and he had at that time sold his interest in the Nebraska land, and Mr. Flickinger had become the owner thereof. The note was not produced at the time of settlement or thereafter; nor was it, so far as we are able to determine from the record, the subject of conversation between the bank, or its representative, and Hudspeth at that time. Neither does it appear that the defendant or Hudspeth afterwards claimed that the note was paid in said settlement until this suit was brought. If it were not for the receipt that we have set out, there would be no foundation for the claim that there was payment or satisfaction thereof in that settlement; for every other fact and circumstance negatives such fact, and the receipt itself is not, in fact, inconsistent with the conclusion that we reach. It only purports to cover "claims by account or assignments." The note in suit was not of either class, and was not, in fact, enforceable against Hudspeth. The \$150 note in suit here was not included in items entering into the settlement; nor was it referred to or produced at that time, or afterwards demanded by Hudspeth or the defendant. The question whether it was, in fact, included in the settlement, because it was made by Hudspeth and the defendant, we presume, was submitted to the jury, however, and it found against the defendant's contention.

In this connection, we may consider the appellant's complaint because it was not permitted to introduce in evidence a letter, written for Mr. Hudspeth in the office of Mr. Flickinger, to Hudspeth's attorneys on the day of the settlement. It recited the substance of the settlement, gave the attorneys directions as to the answer they should file in the suit of the bank against him, and further "to make such receipts as will show that I am not further indebted to said bank, or to C. E. Price, . . . and that all transactions between the said bank, Mr. C. E. Price and myself

2. SAME: exclusion of evidence: prejudice.

are closed." While there is evidence tending to show that some of the bank's representatives were present when this letter was dictated to the stenographer, it is not shown that they paid any attention thereto, or knew its contents. It was a private letter of Hudspeth's to his counsel, and one that the other parties would not be likely to listen to, and, in the absence of a showing that they knew its contents, it clearly would not be competent. It would only be material, in any event, on the question of the payment at that time of the \$150 note, and we think there was no prejudice in excluding it, because of the fact that the court might well have withdrawn the question from the jury on the facts connected with the settlement, which we have already given. And, furthermore, the substance of the letter was already before the jury in the evidence touching the settlement and in the receipt given by the bank.

A great many errors on the admission and rejection of testimony are assigned, so many, in fact, that it is impossible, as well as unnecessary, to notice them in detail. Most of the complaints are of no merit, because the rulings relate to the exclusion of matters entirely foreign to the issues presented, which were that the two notes were paid. We find nothing of such a prejudicial character in the rulings generally as to require a reversal, and we shall only discuss a few matters, in addition to the ruling already referred to, which seem to be of enough importance to demand specific treatment.

Books of the bank, called "counter books," were introduced. Of this complaint is made, because they showed that Hudspeth had given the bank the three \$3,200 notes, hereinbefore referred to, in anticipation of his settlement with Pierce. Whether the ruling was right or wrong can make no difference to the defendant, because his witness, Hudspeth, admitted that he had made the notes, and that the bank had surrendered them to him upon receipt of Pierce's

3. SAME: admission of evidence.

notes, amounting to \$9,600. It is also said that it was error to admit Book Exhibits 41 and 42. We are not advised, however, as to what books they were, nor as to the prejudice occasioned by their introduction. We conclude, therefore, that the appellant does not rely upon the alleged error.

Exhibit 6 was the agreement relating to the dropping of Price's name from the \$4,500 note in suit, to which we have already referred, and the appellant contends that it should have been received, because it "shows a continuation of the claim of the bank against Price and Hudspeth and his joint liability thereon." If it is meant by this that it shows Price's liability on the note, its introduction was not necessary, because Price at all times admitted his liability to the extent of \$1,500, and, in fact, credited the note with that amount before suit, and that is all that is shown by the exhibit. Moreover, plaintiff was not a party to this agreement; nor was any defense based thereon.

Complaint is made because the court held during the trial, and so instructed the jury, that Hudspeth was the only one who had any right to direct the application of the Pierce payment of \$9,600. This holding was in accord with the rule, and was right under the issues and the evidence.

Hudspeth claimed that he had orally directed the bank to apply a part of such payment (\$1,500) to the \$4,500 note in suit, and this was flatly denied by Price. The court told the jury that there was no evidence that the plaintiff bank had a lien on the Nebraska land for the payment of the indebtedness represented by the \$4,500 note, and that the matter should be given no consideration. The record fully warranted this instruction. The court's instruction that there was no tender becomes of no importance in view of an affirmance of the judgment.

Appellant asked a new trial, on the ground that he

4. SAME: exclusion of evidence: prejudice.

had discovered that on the 27th of May, 1908, the plaintiff, through its cashier, Price, had collected \$52.50 of

5. NEW TRIAL: Hudspeth as interest on the syndicate note.
 newly discovered evidence. There is no merit in this claim. Hudspeth's name was on the note in January, 1908,

when the agreement was made to drop Price's name therefrom, and how much longer the note bore the signature of Hudspeth does not appear. It may fairly be assumed, however, that he was still on the note when this interest was collected. Hudspeth, at one time, testified that the \$150 note in suit had been merged in a note of \$2,400; but at another time he testified that the \$150 note had not been paid. This was but a detail of the trial, and the court was not bound to specifically call the attention of the jury to the matter; nor was the jury bound to find that the \$150 note had been satisfied by a merger in another note.

Appellant submitted a motion to strike appellee's additional abstract, because it was unnecessary and largely a repetition of the appellant's abstract. The motion is overruled, but one-half of the cost of printing the same will be taxed to the plaintiff.

The judgment is *affirmed*.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee in Bankruptcy for the AGAR PACKING COMPANY, Bankrupt, Appellant, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee.

Carriers: DISCRIMINATION IN RATES: LIMITATIONS. Actions against 1 common carriers for discrimination in rates are barred in two years, unless there has been a fraudulent concealment of the discrimination.

Same: INTERSTATE COMMERCE: DISCRIMINATION IN RATES. Where 2 hogs were purchased at different markets in the state and for-

warded to one central point, there unloaded, sorted and most of them reloaded and shipped to foreign states, a finding that the first shipment was merely local and did not become interstate until the hogs were reloaded and accepted for shipment out of the state, was authorized; and the granting of an interstate rate from the initial point to their ultimate destination, lower than the local rate to the place of unloading and re-shipment, and such hogs came into competition with those of other purchasers making only local shipments, would constitute an unjust discrimination against the local purchasers, within the meaning of the statutes prohibiting a common carrier from giving preference to any particular person.

Same. Where hogs were purchased especially for shipment out of
3 the state, although assembled at a central point within the state for the purpose of sorting, reloading and determining their ultimate destination, their shipment at an interstate rate was not a discrimination against local purchasers who were charged a local and higher rate of transportation; as the same did not come into competition with local shipments.

Same: LIMITATIONS: PLEADINGS. The statute of limitations when
4 relied upon as a defense must be specially pleaded; so that a general denial of a petition alleging that discriminations in freight rates against the plaintiff prior to the two year limitation period, were fraudulently concealed and did not come to the knowledge of the plaintiff until about the time of bringing suit, was not a sufficient pleading of the statute to raise the question of limitation.

Same: DISCRIMINATION IN RATES: DAMAGES: WHO MAY RECOVER. An
5 action for damages because of alleged violation of the statutes prohibiting discrimination in freight rates is *ex delicto* and not *ex contractu*; so that a purchaser of live stock can not recover such damages for the breach of a contract made by him for the benefit of another, but only such as he himself actually sustained. Thus where it appeared that plaintiff purchased hogs f. o. b. at his place of business, paid the freight and deducted the amount from the purchase price, presumptively at least the consignor and not the plaintiff suffered the damage from any discriminatory rates, and unless overcome by the evidence he is not entitled to recover.

Evans, J., dissenting in part.

Appeal from Polk District Court.—HON. JAMES A. HOWE,
Judge.

TUESDAY, APRIL 9, 1912.

ACTION originally brought by the Agar Packing Company to recover treble damages from defendant for unlawful discrimination in freight rates and other violations of our statutes with reference to the duties of common carriers. The Packing Company having been adjudged a bankrupt, its trustee was substituted as plaintiff, and it is now prosecuting the action. Upon issues duly joined the case came on for trial to a jury, and at the conclusion of plaintiff's testimony the trial court, on motion of defendant, directed a verdict for defendant, and plaintiff appeals.—*Reversed in part.—Affirmed in part.*

Guernsey, Parker & Miller, for appellant.

J. L. Parrish, Robert J. Bannister and J. H. Johnson, for appellee.

DEEMER, J.—To avoid confusion, we shall call the plaintiff and appellant the "Packing Company," and the defendant and appellees, the "Railway Company." The action is brought to recover treble damages from the railway company by reason of its demanding, charging, collecting, and receiving from the packing company, in the form of charges for freight in the transportation of hogs, a greater compensation than it required from other persons for like and contemporaneous service, to the prejudice and disadvantage of the packing company. It claimed:

That during the period between the 1st day of May, 1901, and the 7th day of July, 1906, the plaintiff purchased seven thousand seven hundred and thirty-six cars of hogs and shipped the same over the railroad of the defendant to the city of Des Moines, to be converted into manufactured products at its packing house in said city. That the station from which each of said shipments was made, the weight of each such shipment and the freight rate per

hundred pounds in cents exacted by the defendant on account of each such shipment, and the amount paid as freight by the plaintiff on each of the shipments in question are all shown in 'Exhibit A,' attached to the petition and made a part thereof, and that the total amount of freight so paid during said period was the sum of \$116,943. That during the period from May 1, A. D. 1901, until about March 15, A. D. 1903, one Frank Dodson, and from on or about March 15, 1903, until on or about July 20, A. D. 1905, a firm known as Compton & McRae were engaged in buying hogs in the territory in which the stations named in said Exhibit A are located, in competition with the plaintiff, for shipment to Valley Junction, a station on the line of defendant's railroad five miles west of the city of Des Moines, and that said Frank Dodson and Compton & McRae were so purchasing hogs during the period aforesaid, in competition with the plaintiff, at the stations in question, in the same markets in which the plaintiff was making its purchases and at the same times that the plaintiff was making its purchases in said markets. That all shipments made of hogs purchased by plaintiff from points on the line of the defendant's railroad north and west of Des Moines, to Des Moines, were transported through Valley Junction over the same route over which shipments of hogs from the stations last referred to, to Valley Junction; for Frank Dodson and Compton & McRae, were carried; the latter shipments terminating at Valley Junction, while the former continued to Des Moines. That the said hogs so purchased by said Frank Dodson and Compton & McRae and shipped to Valley Junction were resold by them to purchasers thereof doing business at places other than the city of Des Moines. That after said stock had been resold said Frank Dodson and Compton & McRae were accustomed to reship the same to the purchasers thereof, over the defendant's railroad and its connections, where the point of destination was beyond the lines of defendant's railroad. That the defendant entered into and maintained, during the said period aforesaid, a secret agreement whereby, by the use of various devices, it remitted and rebated to them the entire freight on the hogs so purchased by said Frank Dodson and Compton & McRae, and shipped by them to said Valley Junction,

and at the same time and during the same period the defendant required the plaintiff to pay the full tariff rates on its shipments made at the same times, from the same stations, and over the same lines.

That on or about the 20th day of July, A. D. 1905, the said Compton & McRae ceased doing business at said Valley Junction, and thereupon one J. S. Compton, as agent for John P. Squires & Company, which, as plaintiff is advised and believes, is one of the subsidiary corporations of Swift & Co., engaged in the business of buying hogs at the said Valley Junction, and continued so to do until on or about the 7th day of July, A. D. 1906. That during the said period the said Compton was engaged in buying hogs in the territory in which the stations named in said Exhibit A are located, in competition with the plaintiff, for shipment to said Valley Junction, and that the said J. S. Compton during the period when he was engaged in the said business at said Valley Junction was so purchasing hogs in competition with the plaintiff at the stations in question, in the same markets in which the plaintiff was making its purchases, and at the times that the plaintiff was making such purchases in said markets. That all shipments made of hogs purchased by the plaintiff from points on the line of defendant's railroad north or west of Des Moines, to Des Moines, were transported through Valley Junction over the same route over which shipments of hogs from the stations last referred to, to Valley Junction, purchased by said J. S. Compton, agent as aforesaid, were carried; the latter shipments terminating at Valley Junction. That the said hogs so purchased by the said J. S. Compton, agent, and shipped to Valley Junction, were some of them shipped by him to the said J. P. Squires & Co. in Boston, Mass., and were some of them shipped by him to other places for sale, or resold by him and shipped by him to the purchasers thereof from said Valley Junction; such shipment in each instance being made over the lines of railroad of the defendant and the lines of its connections, where the destination of the shipment in question was beyond the lines of the defendant. That the defendant entered into and maintained, during the period aforesaid, a secret agreement whereby, by the use of various devices, it remitted

and rebated the entire freight on hogs so purchased by the said J. S. Compton, as such agent, and shipped by him to said Valley Junction; and at the same time and during the same period the defendant required the plaintiff to pay the full tariff rates on all of its shipments made during the said period, from the same stations and over the same lines, to the city of Des Moines. That the secret rates and rebates given by the defendant company to the said Frank Dodson, Compton & McRae, and to the said J. S. Compton, agent as aforesaid, were concealed by the defendant from the plaintiff during the entire period, and plaintiff did not learn of such agreement until some time in the fall of the year A. D. 1905, and that during the period that said secret rates and rebates were so given the defendant at all times asserted to the plaintiff and pretended and maintained that it was not giving any rebates to the said Frank Dodson or to the said Compton & McRae or to the said J. S. Compton, agent, or to any other shipper shipping in competition with the plaintiff and asserted and pretended and maintained that it was not in any manner making any concessions from its tariff rates to the said Frank Dodson or to the said Compton & McRae or to said J. S. Compton, agent, or to any other shipper shipping in competition with the plaintiff.

That the defendant never published any tariff establishing the rates given by the defendant to the said Frank Dodson and to the said Compton & McRae and to the said J. S. Compton, agent, and, as the plaintiff is advised and believes, never gave the said rates to any person other than the said Frank Dodson, Compton & McRae, and J. S. Compton, agent. That the privileges and rebates granted by the defendant to the said competitors of plaintiff constituted and were a violation of the provisions of sections 2124 and 2125 of the Code of Iowa, and by giving the same the defendant demanded, collected, and received from the plaintiff a greater compensation for the services rendered by the defendant to the plaintiff in the transportation of property than it charged, demanded, collected, and received from the said Frank Dodson, Compton & McRae, and J. S. Compton, agent, hereinbefore referred to, for a like and contemporaneous service in the transportation of a like kind of traffic, and thereby unjustly discriminated

against this plaintiff. That the acts and doings of the defendant hereinbefore set out constitute and were a giving of preference and advantage to the said Frank Dodson, Compton & McRae, and the J. S. Compton, agent, and subjected the plaintiff to prejudice and disadvantage, in violation of the statutes of the state of Iowa. That the acts and doings of the defendant in the premises constituted and were a discrimination against the city of Des Moines, where the industry of the plaintiff is and was at the times herein mentioned, located, and subjected the said city to prejudice and disadvantage, in that it discriminated against and embarrassed the plaintiff in the conduct of its business in the said city. That on or about the 15th day of August, A. D. 1906, the plaintiff demanded of the defendant the money damages sustained by plaintiff on account of which this action is brought, and that said demand was made more than fifteen days prior to the institution of this action, and that the defendant has failed and refused to pay the amount so demanded of it by the plaintiff.

The answer to this was a general denial of each and every allegation. It was upon these issues that the case was tried, and, as a verdict was directed for the defendant at the close of plaintiff's testimony, we must assume each and every fact which the evidence tends to prove as fully established. The defendant railway operates a line of railroad from Chicago to Omaha, Neb., and other points and has branch lines running from points west of Des Moines into territory west and northwest from that point. It has feeding and watering yards at Valley Junction, Iowa, a town near Des Moines, and is engaged in interstate and intrastate traffic. During the time in question it was defendant's custom to move hogs from all points west from Des Moines in single-floored cars, ship them to Valley Junction, there permit them to be unloaded, fed, sorted, and reloaded into double-decked cars for shipment to points east of the Mississippi river. This arrangement was an economic one, profitable to both shipper and carrier, for more hogs could be loaded into a double-

decked than into a single-floored car. It is claimed by plaintiffs, however, that upon all cars of hogs from the territory in question shipped to Agar & Co. it charged the Iowa distance tariff, and that upon hogs shipped from this territory and afterward sent forward to eastern points it made no charge from points west of Des Moines, to Des Moines, although it admits that defendant charged the full interstate rate from the point of origin to the ultimate point of destination. There was no packing house at Valley Junction, but certain persons established themselves there and during the years in question either for themselves or as agents for others purchased hogs at various places in western and northwestern Iowa, which were consigned to Valley Junction, Iowa, there unloaded, fed, sorted, reloaded in double-decked cars, and as a rule forwarded to points outside the state. A few cars were consigned to local points in Iowa after the arrival and sorting of the hogs at Valley Junction, and a few of these were shipped to the packing company in Des Moines. Upon all these intrastate shipments local distance rates were charged and exacted, and these shipments are not complained of. There were two methods of handling the hogs at Valley Junction. From May 1, 1901, to May 15, 1904, except for a period of about seven months when no hogs were purchased, the freight rate on interstate shipments being the same from Valley Junction east as from all points west and north of Des Moines to the Missouri river, no freights were in fact exacted on the shipments made to the Valley Junction parties on shipments in Iowa over defendant's line of road from points west and northwest from Des Moines; the arrangement being as follows: Waybills were issued on these shipments to the parties at Valley Junction at intrastate or distance rates; but these were not taken into account. When the cars were reloaded at Valley Junction for shipment east of the Mississippi river, they were rebilled to the point of

ultimate destination at the interstate rate, which was the same from Valley Junction as from the point of origin, and although the agent at Valley Junction was charged with the distance rate from point of origin to Valley Junction, this was all rebated and credited to him in this manner: At the end of each month the Valley Junction Railway agent sent to the auditor of the railway company a claim for shortage in his account, which consisted of the difference between the amount he had charged and the amount he had collected from the Valley Junction shippers; this difference being, of course, the Iowa distance tariff rate from all points of shipment within the Valley Junction zone to Valley Junction. These Valley Junction shippers surrendered the original expense bills covering the initial shipment from point of origin to Valley Junction, and these were forwarded to the railway company as vouchers sustaining the claim for relief. A relief voucher was then sent by the railway company to its Valley Junction agent, and he credited himself upon his books with the amount thereof as against the charges made against him because of the initial shipment from point of origin to Valley Junction. Some of the witnesses testified that the railway company collected from the final consignees of the hogs the regular tariff rate from the point of origin to final destination, and this was true in this sense: That the regular interstate rate from point of origin to point of ultimate destination was exactly the same as from Des Moines. As a matter of fact, however, the hogs came from point of origin to Valley Junction in single-decked cars and were reloaded and shipped to point of ultimate destination outside the state in double-decked ones. This practice ceased in 1904, and from and after July 23, 1904, a new system was inaugurated by the railway company. Under this arrangement the hogs were billed locally from points of origin to Valley Junction on the Iowa distance rates, and this rate was in all cases paid to the agent of the railway

company at Valley Junction by the consignees at that point, and when reloaded at Valley Junction and rebilled to points outside the state, the full interstate rate from point of origin to ultimate destination was charged, but credit given thereon for the amount already paid by the Valley Junction consignees on the original billing.

One of the witnesses gave the following explanation of the transaction:

During this period the hogs were billed locally to Valley Junction and the freight charges collected from the originating points to Valley Junction. . . . From Valley Junction, the hogs were shipped to East Cambridge. They were billed from us to Hammond, Ind.; destination East Cambridge. This was not true as to all of the hogs. In some cases, but not a great many, the heading of the bill was changed to read to Des Moines to Chicago. . . . In billing from Valley Junction to East Cambridge, we took weight enough from the weight in to make two double-decks out of three single decks, and the freight rate from the originating point to Valley Junction was deducted from the through rate to Hammond, Ind., which would be from Booneville, say, to Valley Junction, six cents, and the rate from Valley Junction to Hammond would be twenty-three cents. We should deduct six cents and bill them at seventeen and one-half cents. This same practice was pursued in reference to collection of freight charges during this entire period. . . . In all instances I collected the Iowa distance tariff rate to Valley Junction, and in all instances I billed the hogs out for the balance of the through rate from the point of origin to the point of destination. In most instances the hogs were bought in territory where the rate to the point of destination was the same from Valley Junction as from the point of origin. I think there is a change west of Neola. I do not remember an instance where the rate from the point of origin exceeded the rate from Valley Junction. If the hogs went to Chicago, I did no collection. . . . If a car of hogs, for instance, from Dexter was sent to Chicago, I simply diverted the shipment . . . and changed the billing to read Union Stockyards instead of

Valley Junction. . . . When the hogs came into Valley Junction, they were always unloaded. I could not say that where the shipments went forward on the corrected bill the identity of the shipment was maintained.

The Valley Junction agent merely accumulated the waybills on the in-shipments and credited the weight and local freight collected, upon waybills issued by him on outgoing shipments, wholly without regard to the question as to whether the hogs in the outgoing shipments were the same as those contained on the incoming shipment for which he has given credit. In other words, it appears without controversy that local freight in on hogs from, for example, Winterset or Patterson, on the south branch, would be applied as a credit on outgoing shipments from Valley Junction of hogs which had actually been received from some point west on the main line, such as, for example, Atlantic, Stuart, or Dexter, and *vice versa*. When it was determined that hogs were not available for shipments east, and a carload of them had accumulated in the yards at Valley Junction, which it was desired to send to Chicago, or to Ottumwa, or Des Moines, or south Omaha, a waybill would be taken, say, for instance, one covering a shipment from Payne & Co. at Adair, and consigned to Compton & Abbot at Valley Junction, and on this waybill Valley Junction would be changed to Chicago, Payne & Co. would be changed to Compton & Abbot, and the name of the consignee in Chicago would be changed, and the number of the car would be changed, and this car of hogs which did not come in from Payne & Co. would be sent upon this waybill to Chicago, so that Compton and Abbot, instead of paying the regular rate into Valley Junction, and then the rate from there to Chicago, paid simply the rate from Adair to Chicago, equal to the rate from Valley Junction to Chicago. Of course, the packing company had to pay local distance rates on all shipments made by it over defendant's line,

in Iowa, and it is because of this fact that it claims to have been discriminated against, and it asks to recover three times the amount of the freights paid by it for hogs delivered at its plant during the time the above arrangements were in force. As a matter of fact, while the packing company paid these freights to the defendant company, it almost invariably deducted the amount it paid from the purchase price of the hogs and sent the balance to the shipper; for the reason that under its contract with the shippers the hogs were to be delivered f. o. b. Des Moines. One of the agents of the packing company testified that he made complaint to an agent of the railway company of these practices and we here quote from his testimony, as follows:

I told him (Eberhart) that we were at a disadvantage in buying our hogs here as against the people in Valley Junction. . . . I told him that there was freight on hogs coming into Des Moines and none on hogs coming into Valley Junction, and that a shipper could sell at Valley Junction at a given price and net as much at his shipping point as if he had sold in Des Moines at the same price that he had sold in Valley Junction, plus the freight from the originating point to Des Moines.

In the record we also find this letter from one of the railway agents to another:

I have had a traveling man look into the situation carefully at a few of the points west of Valley Junction, and the shippers advise him that the prices offered by the Valley Junction parties enable them to pay practically the same price for hogs at the shipping points, that Agar can offer at Des Moines. Another feature in favor of the Valley Junction market is that at that point, on arrival, they are allowed feed and water before weighing and are charged only with the cost of the feed; while with shipments going to the Agar Company at Des Moines they are allowed no fill whatever and shippers are charged with local freight from shipping point to Des Moines.

One of the important questions in the case is the situation and relations of the parties who handled the hogs at Valley Junction. The testimony is a little obscure here, but we think it fairly appears that, during the first period to which we have referred, there were several buyers operating at Valley Junction on their own account. They purchased in their own names from those who raised or controlled the hogs at point of origin. They were billed from point of origin by these shippers to the parties at Valley Junction upon local waybills. The rate fixed was the Iowa distance tariff. The minimum weights under the local law were used in fixing the rates, and when reloaded and reshipped the waybills were from Valley Junction to the point of ultimate destination, and the rate was the Valley Junction rate, although this was the same as from point of origin.

One witness testified as follows regarding the alleged reconsignment at Valley Junction: "There is an entry in August, 1902, pro book No. 19, Grand Junction, and then in red ink the heading is changed to Des Moines, Iowa, and the weight, the rate, the local and total are scratched out. I do not remember what that was changed for. I presume it was something that was reconsigned, but what it was I don't know. Then under March, 1903, pro No. 149, there appears Prairie City, with the rate, local and total, scratched out, and in lieu thereof written in 'forward, etc.' That is the way we entered up that reconsigned shipment. These were instances of true reconsignments, and show that in such instances no account was kept at Valley Junction of the weight, rate, etc. Whereas, with reference to the hogs shipped in by Compton, Dodson, et al., the record was kept complete, the same as was done in the case of household goods or merchandise of any sort consigned to some person in Valley Junction, its ultimate destination."

Again, it was shown that during this first period the

shipper at point of origin stood the loss on crippled, injured, and dead hogs, while in transit. Again, and more important that any fact so far noted, these various buyers at Valley Junction, while reshipping the hogs to eastern and other markets, paid for the hogs from their own funds before they were reconsigned or reshipped, and, whatever the profit, it was received by the buyers, and if there was any loss it was suffered by them. None of them were bound to ship the hogs received by them to any particular buyer. These Valley Junction buyers also stood all losses on the hogs during shipment from Valley Junction to point of final destination. The operations during the second period to which we have referred were quite different.

During the second period referred to, the hogs were purchased by the Valley Junction operators as agents for Squires & Co. of East Cambridge, Mass. They were paid for by checks signed by Squires & Co., were shipped to Valley Junction either to these parties as agents or to Squires & Co., and were sorted, reloaded, and shipped to Squires & Co. either at East Cambridge or to Chicago. The hogs were purchased f. o. b. point of origin and shipped subject to Valley Junction weights and inspection. No one had any interest in these hogs save Squires & Co., and they stood all losses in transit. None of them were consigned to points in Iowa or to any other persons save Squires & Co., and Squires & Co. paid all freight charges from point of origin to final destination, under the arrangement heretofore stated. None of the hogs were purchased either for the Valley Junction or other state markets, but all were purchased for shipment to some eastern point. They were unloaded, fed, and sorted, in order that their destination might be determined (certain grades being for particular places) and reloaded in double-decked cars for the advantage of both the railway company and the shipper. True, the exact point of ultimate destination

was not known until the re-sorting, but the actual buyers could not divert any shipments for any purpose of their own. They were acting as agents for the real buyer, and not for themselves. All the hogs which came in were accepted by Squires & Co. and paid for by them.

About July 1, 1904, the railway company entered into the following contract with one W. M. Johnston:

That the lessor, for and in consideration of the payments to be made to it by the said lessee, and other valuable consideration, as hereinafter mentioned, has let, demised and leased unto the said lessee, for a term of one year from the date hereof, and thereafter until sixty days' notice in writing shall have been given by either party . . . the stockyards owned by the lessor located at Valley Junction, county of Polk and state of Iowa. The lessor agrees to protect the through rates from original points of origin to final destination as given when shipped out of Valley Junction on all hogs handled through said stockyards. The said lessee agrees to pay local rate on all shipments to said stockyards which are not reshipped, weight settlement to be checked up monthly and adjusted by the said lessee, paying to the said lessor the local rate on any loss between the original weights into Valley Junction, Iowa, and the weights of shipments out; and further, any shipments originating east or south of Des Moines, Iowa, on the main line of the Keokuk and Des Moines Division of the said lessor's railway, and lessee will pay local rate to Valley Junction, to final destination.

The Johnston named in this contract was an agent of Squires & Co., and Johnston afterwards assigned this contract to one Fay, another agent for said company. Very often after the hogs had been delivered to the railway company at place of origin, the destination was changed while en route by changing the waybill and readjusting the rate. As heretofore noted, local distance tariff rates were charged and collected on all shipments made during the second period and credited on the through rate, when ultimate point of destination was determined upon, and

the total rate was concededly the interstate rate from point of origin. In 1904 the packing company made complaints to the railway company of discriminations, and as a result thereof the following contract was entered into between them: "Agar Packing Company. Commencing with June 1, 1904, eastern shipments via Chicago and Chicago proper rate in and out to be equalized on outbound product, as follows: First. Find average rate on in shipments. Second. Actual earnings on outbound shipments. Add average rate inbound shipments and refund excess about twenty-three and one-half cents to Chicago less \$3.00 per car on outbound cars." And in October of the same year they made the following agreements: "Memo.—On live stock purchased at Omaha and shipped over this company's rails into Des Moines and then in shape of products or live stock to Chicago or points beyond Chicago if it pays to Chicago the Chicago rate as outlined below: Charge not to exceed in and out of Des Moines, twenty-three and one-half cents plus \$3.00, switching at Des Moines, plus any additional switching that may be incurred at Omaha or South Omaha. The twenty-three and one-half cents referred to above to effect delivery to any point on our tracks in the city of Chicago or stockyards. The same adjustment to apply on live stock both west of Des Moines and handled at that point to Chicago, as outlined above; the understanding being to give line between Des Moines and Council Bluffs same privilege as the 'Omaha.' October 1, 1904."

It need only be added that under these contracts the packing company received between \$10,000 and \$20,000 in rebates. Although the record is very large, the foregoing facts are practically conceded and are regarded as sufficient for a determination of the questions presented. The action is brought under sections 2124, 2125, and 2130 of the Code, which, so far as material, read as follows:

If any common carrier subject to the provisions of

this chapter shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered . . . in the transportation of . . . property . . . than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (Code, section 2124.) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever. (Code, section 2125.) In case any common carrier subject to the provisions of this chapter shall do, cause, or permit to be done anything herein prohibited or declared to be unlawful, or shall omit to do anything in this chapter required to be done, it shall be liable to the person or persons injured thereby for three times the amount of damages sustained, together with costs of suit, and a reasonable attorney's fee to be fixed by the court, on appeal or otherwise, which shall be taxed and collected as part of the costs in the case. . . . (Code, section 2130.)

The remedy provided in section 2130 applies to discriminations and, as will be noted, is given "to person or persons injured thereby." The primary question for consideration, then is: Was there a discrimination by the carrier against the packing company in the matter of freight rates? And the secondary one is: Was the packing company injured thereby, and, if so, to what extent? Another incidental question is this: Is the action or any part of the items sued for therein barred by the statute of limitations?

It is plaintiff's theory that the packing company

is entitled to recover all freights paid by it during the time covered by the petition, because the favored shippers paid nothing on like shipments here in Iowa. Such actions as this are barred within two years, unless fraudulently concealed, etc.

1. CARRIERS:
discrimination
in rates:
limitations.

It becomes necessary, in settling the primary question, to differentiate between the two different arrangements under which the shipments in question were made and

2. SAME: inter-
state com-
merce: dis-
crimination
in rates.

to determine whether or not the shipments to the favored shippers were local or interstate in character. If the shipments were interstate in character, then plaintiff's counsel practically concede that there can be no recovery because, although the rate charged for that part of the haul in Iowa was less than the local distance tariff, still there was no unlawful discrimination. It is necessary, then, in the first instance, for plaintiff to show that there were two shipments instead of one, and that the first shipment covered the same territory in which the packing company was operating, and applied to like shipments to those made by the plaintiffs. Upon this proposition we think that there was enough testimony to take the case to the jury. A jury would have been authorized to find that under the first arrangement the railway company transported hogs to parties who were buying in the local market at Valley Junction, for nothing or without any charge being made for the haul, while at the same time exacting local distance rates from the packing company upon substantially similar shipments. The mere fact that these local buyers sorted the hogs and afterward shipped the bulk thereof on their own account to persons outside the state does not change the rule. The shipment did not become interstate until the hogs were accepted by the railway company at Valley Junction for shipment outside the state. The unloading at Valley Junction

and the reshipping from that point did not change the rule, although these local buyers intended to make the bulk of the shipments from Valley Junction to some point outside the state. The fact that the rate would have been the same had the shipment been made from the point of origin to the ultimate destination of the hogs does not change the rule; for in the one case the buyers were in direct competition with the packing company at Valley Junction and at any other point in the state to which shipments might be made by them. Appellees counsel practically concede that if there were two shipments, one from point of origin to Des Moines and the other from Des Moines to some point without the state, then there was a discrimination against all buyers at the Valley Junction market or elsewhere where they were thrown into competition with these buyers at Valley Junction. These views find support in the following, among other cases: *Gulf Ry. v. Texas*, 204 U. S. 403 (27 Sup. Ct. 360, 51 L. Ed. 540); *Coe v. Errol*, 116 U. S. 517 (6 Sup. Ct. 475, 29 L. Ed. 715); *Penn R. Co. v. Knight*, 192 U. S. 21 (24 Sup. Ct. 202, 48 L. Ed. 325); *General Oil Co. v. Crain*, 209 U. S. 211 (28 Sup. Ct. 475, 52 L. Ed. 754); *Augusta Co. v. Railroad*, 5 Ga. App. 187 (62 S. E. 996); *State v. Mo. Pac.* 81 Neb. 15 (115 N. W. 614); *Ala. Ry. Co. v. Mississippi Com.*, 203 U. S. 496 (27 Sup. Ct. 163, 51 L. Ed. 289); *Ala. Co. v. Com.*, 86 Miss. 667 (38 South. 356). We shall not take the time to quote from these cases, as they are available to the profession in general and are in line with our conclusions.

II. As to the shipments made during the second period, we are quite as well convinced that they were interstate and not discriminatory in character. True the ultimate

3. SAME. mate destination was not known until the arrival and sorting of the hogs at Valley Junction; but they were all destined to points outside of the state and were accepted by the carrier with this

understanding. The unloading, sorting, and reloading was to determine the exact point of ultimate destination and to get the advantage of the double-decked cars. The hogs were at all times purchased for and belonged to Squires & Co., and they could not be diverted to points within the state or delivered to any one other than Squires & Co. or to persons authorized by them to receive them. These shipments were not made under the same or similar circumstances to those made by the packing company, the sales to the ultimate purchaser were not in competition with it, and, so far as shown it, the packing company had no interstate shipments of live hogs to make in competition with Squires & Co. and was not at any time denied the same rates for like shipments. Moreover, under its two contracts for rebates on shipments made of the finished product to eastern markets, the rates were equalized and the packing company was placed at no disadvantage on its manufactured goods in the markets where it came in competition with Squires & Co. or other eastern packers. The arrangement at Valley Junction was a sort of milling in transit agreement, which had been upheld not only by the Interstate Commerce Commission, but by the courts as well. See, as sustaining these views: *Laurel Cotton Co. v. Railway Co.*, 84 Miss. 339 (37 South. 134, 66 L. R. A. 453); *Central Pine Assn. v. Railway Co.*, 10 Interst. Com. R. 193; *In re Unlawful Rates*, 8 Interst. Com. R. 121.

As sustaining the proposition that the rates were not discriminatory, see: *I. C. C. v. Ala. Ry. Co.*, 168 U. S. 144 (18 Sup. Ct. 45, 42 L. Ed. 414); *Texas R. R. v. I. C. C.*, 162 U. S. 197 (16 Sup. Ct. 666, 40 L. Ed. 940); *I. C. C. v. B. & O. R. R.*, 145 U. S. 263 (12 Sup. Ct. 844, 36 L. Ed. 699); *Parsons v. Railroad*, 167 U. S. 447 (17 Sup. Ct. 887, 42 L. Ed. 231); *Conan v. Bond* (C. C.) 39 Fed. 54; *Knudsen v. Railroad Co.*, 148 Fed. 974 (79 C. C. A. 46). We shall not stop to

quote from these cases, for they announce well-settled rules of law upon the question of discriminations. This conclusion eliminates all shipments made under the second arrangement to which we have referred.

III. The railway company contends, however, that action for recovery of damages for discriminations under the first arrangement is barred by the statute of limitations, and this is no doubt true, had the railway company pleaded the statute. This it contends it did, but we find no such plea. It is true that plaintiff, the packing company, presumably perhaps to save its petition from a demurrer, averred that the discriminations practiced against it prior to October, 1904, were fraudulently concealed and did not come to its knowledge until about the time of the bringing of this suit. The only answer to the petition was a general denial. Nothing was said about the statute of limitations. Now, under this general denial the plaintiff was not required to prove more than under the issues would give it a *prima facie* right to recover, no matter what it may have charged in the petition. Code, section 3639, and cases cited thereunder. Again, allegations as to time are not as a general rule material, and plaintiff may prove any other date. Code, section 3613, and cases cited. If one would rely upon the statute of limitations, he must specially plead it. *Tredway v. McDonald*, 51 Iowa, 663; *Jenks v. Lumber Co.*, 97 Iowa, 342; *McDonald v. Bice*, 113 Iowa, 44; *Belken v. Iowa Falls*, 122 Iowa, 430; *Borghart v. Cedar Rapids*, 126 Iowa, 313. Again, section 3563 of the Code provides that, "when any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer," and in *Robinson v. Allen*, 37 Iowa, 27, it is said that, if the statute of limitations is not set up in the answer, it can not afterward be relied upon. Defendant says that to do more than it did would amount to nothing

4. SAME:
limitations:
pleadings.

more than stating a conclusion of law. While it may be that such a pleading would be conclusion of law from facts pleaded or admitted, yet as applied to certain defenses as the plea of the statute of limitations a conclusion is proper pleading. If raised by demurrer it is a conclusion, and if the petition is not vulnerable to a demurrer the statute expressly says that the *objection* may be taken by answer. Without a plea of the statute plaintiff was not required to prove the alleged fraudulent concealment, for it was not necessary to entitle it to recover unless the plea of the statute was interposed. We do not think the answer sufficiently raises the bar of the statute of limitations.

IV. But one question remains, or rather two questions involved in the one: Was the packing company injured by the discriminations under the first arrangement,

5. SAME: discrimination in rates: damages: who may recover.

and, if so, to what amount? The action is not *ex contractu* but *ex delicto*, and the packing company, if it recovers at all, must do so in its own right and not because it made a contract in the name of or for the benefit of another who was damaged by the breach of that contract. The action is not for the benefit of another, but to recover three times the amount of damages sustained by it as the injured party. On the one hand, it is contended that, as the packing company paid the freight on hogs shipped to it during the time covered by the first period, it is entitled to the full amount of the freights paid by it from the common territory, and that this should be trebled. On the other hand, the railway company contends that as the hogs which were shipped to the packing company were f. o. b. Des Moines, the shipper paying the freight or in all cases suffering the amount thereof to be taken from the purchase price before it was remitted by the packing company to the shipper, the packing company sustained no loss; that the loss was the shipper's and that, if plaintiff is permitted to recover, the railway company might again be held liable to the

shippers. Although the record is very voluminous and covers practically every point in the case, there is no proof that the packing company had to pay the original shipper more for his hogs because of the f. o. b. Des Moines shipment than its competitors were paying during the first arrangement. We can not assume without proof that such were the facts. The competitors at Valley Junction may have had this much more profit, paying no more for the hogs at place of shipment than the packing company even where the shipper paid the local freight, but the question is: Is this loss of profits the measure of plaintiff's recovery under the allegations of the petition, from which we have elaborately quoted in order that all the questions presented may be thoroughly understood. This to our minds presents the most doubtful question in the case. Few, if any, authorities are cited on either side upon this proposition.

In *Union Pacific R. R. v. Goodridge*, 149 U. S. 680 (13 Sup. Ct. 970, 37 L. Ed. 896), the court, speaking through Mr. Justice Brown, said:

The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new industries; but, deriving its franchise from the Legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality. *Scofield v. Railway*, 43 Ohio St. 571 (3 N. E. 907, 54 Am. St. Rep. 846); *Sandford v. Railway*, 24 Pa. St. 378 (64 Am. Dec. 667); *Messenger v. Pennsylvania Railroad*, 36 N. J. Law, 407 (13 Am. Rep. 457); *McDuffie v. Portland, etc., R.*, 52 N. H. 430 (13 Am. Rep. 72). So opposed is the policy of the act to secret rebates of this description, that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the com-

pany will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices he may know precisely with what he has to compete. . . . The seventh and last assignment of error was to the action of the court in refusing to grant a new trial, and in entering a judgment on the verdict, because there was no sufficient evidence to support the verdict, and especially to sustain it as to the amount of damages. Plaintiff's evidence had shown that the Marshall Company had been receiving a rebate upon all coal transported by it to Denver, which was not allowed to its competitors in business, and the damages sustained by the plaintiffs were measured by the amount of such rebate, which should have been allowed to them. The question whether they lost profits upon the sale of their own coal by reason of the nonallowance of such rebates was too remote to be made an element of their damages. They were entitled to the same terms which the Marshall Company would have received, and damages to the exact extent to which the Marshall Company was given a preference.

This case seems to eliminate the question of profits. But it does not expressly decide the proposition now before us. The references made by appellant's counsel to Elliott on Railways, sections 1559 and 1692, give no aid upon this proposition, and the only case which even touches it which has been called to our attention is the *Goodridge* case, *supra*. True it is that a consignee of goods may as a general rule under the laws of this state sue the carrier for damages due to delay, injury, or destruction of the goods. *Bank v. Express Co.*, 127 Iowa, 1, and cases cited. But this is upon the theory that presumtively the consignee is the owner of the goods, title having passed to him at least inferentially upon delivery to the carrier. This of course, is a mere presumption, which doubtless may be overcome by proof. But, however that may be, it does not necessarily follow that the consignee of goods is the person injured where discrimination in rates is shown. Whether or not he is so injured may depend upon the

facts. Presumptively he is, no doubt, the person injured; but we think it is only a presumption, and that if the testimony shows he suffered no injury, no recovery may be had. The question reduced to its last analysis is primarily one of statutory construction.

What is meant by the phrase, "person injured thereby, for three times the amount of damages sustained in consequence," etc.? Upon this proposition we have discovered some cases which, while not conclusive, throw some light upon the proper interpretation of the statute. Thus in *Atchison, T. & S. F. R. R. v. Goetz et al.*, 51 Ill. App. 151, it was held that the actual consignor of the goods might sue to recover excessive freight charges, although the bill of lading ran in the name of another.

In *Summers v. Southern Ry. Co.*, 138 N. C. 295 (50 S. E. 714), the Supreme Court of North Carolina said:

Ordinarily, in case of a shipment of goods by a railway to a person who has ordered them, on delivery to the railway the company receives them as the agent of the vendee or consignee, and such person would be the aggrieved party by delay in forwarding. But in this case, by the terms of the agreement between the plaintiff and Ward & Son, the plaintiff was not to get credit for the returned goods till they were received by Ward & Son. It made no difference to this firm whether the goods were returned or not. They had their account against the plaintiff, and a fair interpretation of the agreement between the parties is that no credit was to be given till the goods came to hand. Until this occurred, the loss of the goods would have been the loss of the plaintiff, and he alone was interested in urging the shipment.

By a statute in the state of Indiana telegraph companies were required to transmit messages impartially, and the act provided that for any violation the company should be liable to the party aggrieved in a penalty of \$100. In construing this penalty clause the Supreme

Court of that state, in *Hadley v. W. U. Tel. Co.*, 115 Ind. 191 (15 N. E. 845), said:

So far as we are at present advised, this court has uniformly ruled that it was only the sender of a telegraphic dispatch who could recover the fixed penalty prescribed by section 4176 (Rev. St. 1881), *supra*, for a violation of its provisions, and in argument the correctness of these rulings is conceded. See *Telegraph Co. v. Brown*, 108 Ind. 538 (8 N. E. 171), above cited. But it is now sought to be maintained that, under the act of 1885 (Acts 1885, c. 48), the right to sue for and recover the fixed penalty is not restricted to the sender of the dispatch, but that the phrase 'any party aggrieved' is broad enough to include as well the person to whom, or corporation to which, the dispatch is directed, when aggrieved by a non-compliance with the requirements of that act. In the construction of a statute authorizing the recovery of a penalty, a strict, rather than liberal, interpretation ought to be given to its provisions; and in such a case, as in others where the meaning is seemingly obscure, a resort may be had to previous legislation on the same subject. *Telegraph Co. v. Axtell*, 69 Ind. 199; *Telegraph Co. v. Roberts*, 87 Ind. 377; *Telegraph Co. v. Mossler*, 95 Ind. 29. It is true that the fixed penalty is imposed for the breach of a duty which telegraph companies owe to the public generally, and not as damages for the nonperformance of a contract to properly transmit a dispatch. But such a breach of duty can not arise until after a telegraph company has either entered into a contract, or has become obligated to transmit the dispatch. The generally accepted doctrine, both in this country and in England, has so far been that it is only the sender of a dispatch who occupied that privity of contract or relation with the telegraph company which is necessary to the maintenance of a suit for the statutory penalty. It is to him, and only to him, as the holding has so far generally been, that the company directly assumes the obligation of sending the dispatch in the manner required, and under the restriction imposed by the law. This is well illustrated by the case of *Telegraph Co. v. Pendleton*, 95 Ind. 12 (48 Am. Rep. 692), and the authorities there cited. That case has been dis-

approved by the Supreme Court of the United States, in so far as it treats of certain interstate relations in telegraphy; but in all other respects it remains unimpaired. We do not feel at liberty to hold that this long and well-accepted rule of decision has been changed by the act of 1885. It is but reasonable to suppose that if the Legislature had intended to change a rule so well defined, and generally recognized by the courts, it would have done so in terms more direct and more explicit. The principal object of the first section of the act in question evidently was to protect the interests of the patrons of telegraph companies by preventing, so far as is reasonable, any discrimination between them. It is only those who give business to, and send dispatches over the wires of, a telegraph company, that can rightly be called its patrons, within the meaning of the statute. In this view, it is only those entitled to be considered as the patrons of such a company who are authorized to enforce the statutory penalty when it has been incurred. The person to whom a dispatch is sent can not, therefore, become a party aggrieved, in the sense contemplated by the act under consideration. Any other construction might result in a multiplicity of suits to recover the same penalty. See, also, *Crosby v. Pere Marquette R. R.*, 131 Mich. 288 (91 N. W. 124).

It is true that the statute now before us provides a penalty; but the penalty can not be recovered save by a party injured, and the amount is based upon the actual damages suffered by the party against whom the discrimination is made.

Our final conclusion is that the question is finally one of fact. If the consignee of the goods has shown that he suffered damage by reason of the discrimination, he is entitled to recover; otherwise not. Doubtless the presumption is that a consignee who pays the freight is the party injured; but, if the freight is finally collected from the consignor, then the presumption immediately shifts, and he is *prima facie* the party injured. Here the packing company paid the freight in the first instance; but it charged the amount thereof to the consignor's account and

deducted the same from the purchase price of the hogs. If there was any discrimination, the party presumptively injured was the shipper, who actually paid the freight.

We shall now turn to the record to discover if there is any testimony sufficient to take the case to the jury upon the proposition that the packing company was the person injured. The testimony shows that in some few instances the freight paid by the packing company was not charged back to the shipper, and as to these we think plaintiff made a *prima facie* case for recovery. We shall not undertake to state the amount, for this is not our duty. As to these, it is apparent the matter should have been submitted to the jury.

One of plaintiff's witnesses stated as conclusion that the amount of freight paid by the packing company affected the price of the hogs bought by it to the amount of the in-freight; but he also said that: "The prices we made to our shippers were based on the rates at Des Moines. Take, for instance, \$6.50 a hundred pounds; a car weighing 20,000 pounds would come to \$1,300. If the rate in was thirteen cents a hundred, that would make \$26. I would pay the freight to the railroad, and I would send the shipper a check for \$1,300 less \$26, and the amount that I actually paid for the hogs was the sum of these two items, or \$1,300."

We find no showing as to amount per hundred paid to the shipper by the packing company, and have been unable to discover the basis for the price paid by the packing company to the shipper. Counsel for the packing company say, in their brief, that: "The freight paid was entered into and made a part of the actual cost of the hogs to the Agar Packing Company at Des Moines. This is true regardless of the fact as to whether the Agar Packing Company did or did not deduct from the remittance to the shipper the in-freight on the cargo of hogs received from him. Clearly the freight paid entered into

the value of the hogs bought by the Agar Packing Company, and entered into the cost of those hogs to that company when they were unloaded in its yards at the packing plant in Des Moines." But this is a mere deduction not based upon any showing as to the actual cost of the hogs per hundred pounds. Again, they say: "The real truth of the matter, as shown by the evidence, is that the shippers at point of origin sold their hogs to the Agar Packing Company at a price represented by the difference between the freight into Des Moines from points of shipment, and the Chicago market price of hogs, so that neither in theory nor in fact is there any foundation for the claim that Agar Packing Company did not pay the freight. We have already pointed out in our principal argument that under the statute the remedy is granted to 'the person injured,' and the evidence discloses beyond a peradventure that the Agar Packing Company was the person injured by the discrimination which the statute forbids." Assuming this to be true, it does not necessarily follow that the packing company was discriminated against; but we find no testimony that the basis of the price to the shipper was the Chicago market. No such testimony is pointed out, and we do not find it in the record. However, as there were some freights paid by the packing company which were not repaid or refunded or charged to the shipper, the trial court should not have directed a verdict. The ruling on that part of the motion relating to shipments made since July, 1904, was correct.

In closing this opinion it may not be out of place to say that, so long as interstate rates of freight are arbitrary and empirical, so long as carriers engaged in such traffic may establish traffic zones covering many miles and in some instances an entire state, and so long as local tariffs are on a distance basis, there will be discriminations not only as between shippers who make interstate shipments, but between such shippers and those who would make

local intrastate shipments. It is conceded that the interstate rate on hogs is the same from Des Moines or Valley Junction to various eastern points as from Council Bluffs and Omaha. By reason of that fact the shipper from Council Bluffs gets his hogs carried from that point to Valley Junction free of charge. And the universal holding has been that unless the consignee stops his interstate shipment at Des Moines, and brings his product in direct competition with the local buyer at that point, there is no unlawful discrimination. Such arrangements have no doubt driven many factories and packing plants out of Iowa or have made it impossible for them to locate in this state, although near the source of raw material; and this the state is powerless to prevent. The remedy, if there be any, is in the hands of the carriers, unless Congress sees fit to intervene and establish a distance tariff over the entire country. This remedy may be entirely too drastic, and, so far as we have observed, no one has yet been so bold as to suggest this as a cure. The equivalent of a milling in transit rate to all factories and plants seems to be the only solution, and that seems to have been given the packing company in question.

Our conclusion does not exactly agree with that of the learned district court, and from what has been said it is apparent that as to some of the items sued for the case should have gone to the jury. As to others, plaintiffs have no right of recovery.

Affirmed in part, and *reversed* in part.

EVANS, J. (dissenting in part).—I want to concede that the majority opinion presents on the whole an excellent analysis of this voluminous and complicated case. I agree with it in the main and am somewhat reluctant to find any fault with it. I can not avoid the conviction, however, that we are not justified upon this record in the partial reversal of the order of the trial court. I arrive

at this conclusion from two or three points of view which I will suggest as briefly as I can.

L. The majority opinion holds that the trial court properly withdrew from the jury all items based upon transactions subsequent to July 27, 1904. In this view I concur. For the same reason I think the trial court properly directed a verdict as to the items preceding such date. I think the substance of the arrangement under which the defendant operated was essentially the same throughout the entire period. The prominent difference in the methods employed *before* July 27, 1904, and *afterwards* was that in the latter period the Iowa distance tariff was actually *paid*, and the amount so paid was applied as a credit upon the interstate rate, whereas in the earlier period full Iowa distance tariff to Valley Junction was actually *charged*, and the amount so charged was later applied as a credit upon the interstate rate in all cases where the hogs were destined into another state. The diminution was always made upon the interstate rate and never upon the Iowa rate. Where there was no interstate rate, there was no diminution or discrimination of any kind. The essential purpose of both methods was to obtain what is termed in the majority opinion as a "milling in transit rate," for interstate shipments; the full Iowa distance tariff to Valley Junction being in all cases charged to the persons for whose benefit the shipment was made. The charge was a valid liability. There was therefore, in all cases, a period of time after the arrival of the shipments at Valley Junction where there had been no violation of the Iowa law. If there was any violation of either the state or the federal law, it arose afterward in connection with the reshipment to points without the state. Clearly, such reshipment was interstate shipment. If the interstate rate collected thereon was reduced by the amount already paid or charged as the Iowa distance tariff, the legality of such act must be determined under the fed-

eral statute and not under the Iowa statute. There is one feature of the record at this point which has not received mention in the majority opinion. All the interstate shipments made from May, 1901, to August, 1902, were made pursuant to an arrangement between the defendant and Kingan & Co. of Indianapolis. So far as the defendant is concerned, the arrangement between it and Kingan & Co. was precisely the same as that entered into with J. P. Squires & Co. in 1904. Frank Dodson was the purchasing agent for Kingan & Co. for the period mentioned, whereas Compton was the purchasing agent for Squires & Co. The contract between Kingan & Co. and its purchasing agent was somewhat different in its terms from the contract between Squires & Co. and its purchasing agent. However, the contract in each such case was a contract between the principal and his agent. But the relation of the defendant railroad company was precisely the same as to each principal. From August 17, 1902, to March 1, 1903, no hogs were shipped from Valley Junction. From March 1, 1903, to March 1, 1904, Compton & McRae operated under the same arrangement with the defendant as Kingan & Co. had done. They were local buyers. But the arrangement entered into was applicable only to interstate shipments. This arrangement was terminated March 1, 1904. From that date no hogs were shipped from Valley Junction until the arrangement was entered into with Squires & Co. in July, 1904. Prior to the commencement of this suit, the plaintiff served a written demand upon the defendant in accordance with the requirements of section 2130 of the Code of 1897. The discriminations charged in that demand were confined to those made in favor of Squires & Co. and Compton & McRae. No complaint was made therein as to any discrimination in favor of Kingan & Co. or of Frank Dodson.

II. It is held in the majority opinion that the plaintiff is in no position to recover as for freights paid and

charged by it to the shipper. In other words, that the defendant in such a case is liable, if at all, to the person in whose behalf the freight was paid. With this view I agree. It is said, however, that there were some instances where the plaintiff company paid the freight in its own behalf, and that as to such items there should be a reversal of the order of the trial court. I think the record before us does not justify a partial reversal upon that ground. Mr. Agar, the general manager of the plaintiff company, testified as follows:

The prices we made to our shippers were based on the rates at Des Moines. Take, for instance, \$6.50 a hundred pounds; a car weighing 20,000 pounds would come to \$1,300. If the rate in was thirteen cents a hundred, that would make \$26. I would pay the freight to the railroad and I would send the shipper a check for \$1,300 less \$26, and the amount that I actually paid for the hogs was the sum of these two items, or \$1,300. The number of hogs bought on the track at the various places of origin was small in comparison to the other method of buying; where they were so bought, the infreight was paid by the plaintiff, the freight following. It would not be advanced. It would be computed, and we would pay it, and the price paid the shipper would be based upon where the hogs originated, and in that instance the cost would be made up of the two items. Exhibit 162 is what we call our account sales. The number inserted under the proper heading shows the number of animals. The notation '2 CRIP' means cripples. This with the 65 is footed up to make the 67. There was one dead. Under the 'deduct' is \$2 deducted. This was probably on account of something wrong with one of the hogs. The price \$4.15 is for the 65, for the sound hogs. For the crippled hogs the price is \$3.25. There is something added on account of the dead hogs. This makes \$815.82. Freight is opposite the words, 'less freight,' \$15.55. This amount \$15.55, the plaintiff paid the railroad, and \$800.27 was remitted to the shipper. The plaintiff made no payments on account of these hogs further than the two payments that have been referred to, one to the railroad and

the other to the shipper; but it did make these two. This illustrates the way in which the payments were made when the hogs were bought at a price at our yards. Taking Exhibit 163, the number of hogs is 127, indicating two cars. I do not know what the words, 'less two stopped at Valley Junction,' mean. In this account sales, we find the memorandum, 'we pay,' and the freight is \$43.61; in that case it is added. The amount, \$2,705.24, was paid by the shipper and the freight, \$43.61, was paid to the railroad company. This illustrates the way the account sales were made up, where the memorandum bore the notation 'we pay.' These are the cases where the hogs were bought at a price at point of origin.

Talbot, one of the purchasing agents of the plaintiff, testified as follows:

The prices I gave them were prices delivered at Des Moines, and I bought the hogs delivered there. Freight was deducted from the proceeds, but I do not know who paid it. I made out a bill showing the freight deducted. The shipper does not pay it, and I don't know who does pay it unless the packing house does. If a man shipped a carload of hogs, and we agreed to pay him 4½ cents we remitted to him on the basis of 4½ cents after deducting the amount of the freight on the hogs from the point of origin to the Agar Packing Company.

Only two instances are made to appear in this record where the plaintiff purported to pay the freight on its own account. These two items amount to \$63. In view of the fact that this suit is brought for \$350,000 upon more than 7,000 items, these two items become comparatively insignificant. The appellant has not asked a reversal upon this ground. There is also a feature of the record which presents a very substantial reason why a reversal should not be had for these small items. The written demand served by plaintiff upon defendant preliminary to the suit to which reference has already been made contains the following tender of credit: "The undersigned further notifies you that the amounts heretofore paid by you to

the undersigned on account of such discrimination may be credited by you upon the amount hereby demanded; such credit is not now made by the undersigned because the undersigned is not advised of the amounts of the payments so made by you." The foregoing provision has reference to a certain contract between plaintiff and defendant in relation to interstate shipments of manufactured products which contract is referred to and set out in part in the majority opinion. It appears from the testimony of Mr. Agar that the plaintiff company received from the defendant in adjustments under this contract not less than \$10,000 nor more than \$20,000. This is the credit which is tendered in the written demand as above indicated. In view of this voluntary tender which appears in the record, it ought to be deemed sufficient to absorb the small items upon which liability might otherwise be predicated.

III. I am not satisfied with the discussion of the majority on the subject of the statute of limitations. I agree that the statute of limitations is an affirmative defense and must be pleaded as such. I may add that it is governed by the same statute that applies to other affirmative defenses. If the petition shows upon its face that the cause of action is barred by the statute of limitations, the plea of the statute may be interposed by demurrer. A failure to demur, however, does not waive it under our present statute, and it may be interposed by answer. If the petition upon its face does not show the cause of action to be barred, then of course no demurrer will lie. In the case before us the petition shows upon its face that a part of the cause of action would be barred by the statute of limitations except for the affirmative allegations in the petition pleaded in avoidance of such bar. Clearly a demurrer to the petition would not lie. Would an affirmative defense based wholly upon the statute of limitations lie to such petition? If so, we are driven into an illogical position. The question is governed by sec-

tions 3563, 3566, and 3629. Section 3566 provides what an answer shall contain. Only subdivision 4 thereof is applicable to the plea of the statute of limitations. It provides as follows: (4) "A statement of any new matter constituting a defense. . . ." Under this section the statute of limitations is pleadable as a distinct and affirmative defense. If the statute as pleaded does not present of itself an affirmative defense, there is no statutory provision for pleading it at all. Section 3629 provides for a defense "which *admits* the facts of the adverse pleading but by some other matter seeks to avoid their legal effect." This is confession and avoidance. Turning now to the petition, it recognized the apparent bar of the statute of limitations and pleaded affirmatively in avoidance thereof. On this question, the petition itself is in the nature of a confession and avoidance. Suppose the defendant had undertaken to plead the statute of limitations as a separate defense in its answer, what affirmative matter could it aver? It could aver that more than two years had elapsed after the accruing of the cause of action and before the commencement of this suit and that the cause of action was therefore barred. Could it be said that this plea presented a good defense against plaintiff's cause of action as pleaded in the petition? Suppose the plaintiff should demur to such division of the answer on the ground that the facts pleaded in such defense in support of the plea of the statute were fully avoided by the allegations of the petition, and that the allegations of such division of the answer presented therefore no defense to the petition. Is there any logical escape from saying that such demurrer would be good? Where a plaintiff chooses to render his petition invulnerable to a plea of the statute of limitations either by demurrer or answer, by alleging affirmative matters in avoidance thereof, he ought not to be permitted to say that the question may not be raised on the trial at the close of his evidence, if he fails to

prove the avoiding facts. Even though he fail to prove the avoiding facts, his petition stands as invulnerable as ever as a question of pleading. In this case the defendant raised the question of the statute of limitations at the close of plaintiff's evidence in the only manner logically open to it. The petition itself tendered issue upon the avoiding facts, and plaintiff failed to prove them. Defendant's motion was in the nature of a demurrer to the evidence. The failure of the evidence did not entitle him to demur to the *petition*, for that remained as unassailable as before. If the plaintiff had withdrawn his allegations as to fraudulent concealment upon his failure to prove the same, a somewhat different question would be presented.

The fact remains that the plea of the statute of limitations was specifically urged by the defendant as a ground for a directed verdict in the court below as soon as the plaintiff rested its case, and that plaintiff so rested without making any proof of the allegations which rendered its petition invulnerable to that plea, either by demurrer or affirmative defense. The majority opinion holds, in effect, that under no circumstances can the statute of limitations be made available in this way. To so hold is to my mind both technical and illogical, although not without support in authority. Nor are we required to so hold by any mandatory provision of the statute. Nor can I find anything in our past holdings to cover such case as this. The majority opinion treats the allegations of the petition charging fraudulent concealment as mere surplusage, pleaded inadvertently or otherwise. If they can be deemed as such, of course they need not be proved. But it is too plain for argument that these allegations were not pleaded inadvertently, nor can they be deemed as surplusage. They were manifestly pleaded for the express purpose of preventing a plea of the statute of limitations. They served the intended purpose of the plaintiff. On what logical theory can they be treated as

surplusage after their work is fully done? It was held in *McDonald v. Bice*, 113 Iowa, 44, that the defense of the statute of limitations "is a confession and avoidance." How could the defendant confess and avoid the petition as drawn?

In *Borghart v. Cedar Rapids*, 126 Iowa, 317, it was held that: "The bar of the statute must be made an issue, and it seems hardly necessary to say that a motion to direct a verdict is necessarily based on the issues as previously joined and the evidence bearing thereon. By failing to make the statute of limitations an issue in the case, that defense was waived." In the case before us, the plaintiff voluntarily tendered the issue and confined it to the avoiding facts pleaded by itself. If in this state of the pleadings we still apply the general rule that the statute of limitations must be affirmatively pleaded by the defendant, we are adopting an illogical position without any necessity for it.

Turning to the authorities, they are in much confusion on the subject of pleading in the presence of the statute of limitations. In some jurisdictions it has been held that, when a plaintiff brings his action after the expiration of a statutory period of limitation, it is incumbent upon him in the first instance to plead the avoiding facts in his petition and to prove the same on the trial. *Humphrey v. Carpenter*, 39 Minn. 115 (39 N. W. 67); *Morrill v. Little Falls*, 53 Minn. 371 (55 N. W. 549, 21 L. R. A. 174); *Westervelt v. Filter*, 2 Neb. (Unof.) 731 (89 N. W. 994); *State Bank v. Frey*, 3 Neb. (Unof.) 83 (91 N. W. 239); *Newman v. Linderholm*, 68 Neb. 364 (94 N. W. 617). On the other hand, it has been held in other jurisdictions that it is not proper to anticipate in the petition the defense of the statute of limitations; and that, if avoiding facts be pleaded in the petition, they will not avail the plaintiff, but that the same, in order to be available, must be pleaded in the reply. *Concannon v. Smith*, 134

Cal. 14 (66 Pac. 40); *Wall v. Chesapeake*, 200 Ill. 66 (65 N. E. 632); *Gunton v. Hughes*, 181 Ill. 132 (54 N. E. 895). In some jurisdictions it has been held that the plea of limitations can not be interposed by demurrer where the statute provides that it shall be raised by answer. *Satterlund v. Beal*, 12 N. D. 122 (95 N. W. 518); *Hedges v. Conger*, 10 N. Y. St. Rep. 42; *Grogan v. Valley Co.*, 30 Mont. 229 (76 Pac. 211). In other jurisdictions it has been held, under a like statute, that the term "answer," as used in the statute, will be construed to include any pleading presenting an issue of fact or law, and that the plea of limitation may therefore be interposed either by answer or demurrer or by a *special exception*. *Hopkins v. Wright*, 17 Tex. 30; *Smith v. Fly*, 24 Tex. 345 (76 Am. Dec. 109); *Howell v. Howell*, 15 Wis. 55; *Motes v. Gila Valley*, 8 Ariz. 50 (68 Pac. 532); *Rivers v. Washington*, 34 Tex. 267; *Sheldon v. Keokuk & Northern (C. O.)* 8 Fed. 769. There are many exceptional cases wherein the general rule as to pleading the statute of limitations has been held nonapplicable. These are cases where the defendant is found not to be in fault in failing to plead the statute. *Dreutzer v. Baker*, 60 Wis. 179 (18 N. W. 776); *Nelson v. Cooper*, 108 Fed. 919 (48 C. C. A. 140); *Gottschall v. Melsing*, 2 Nev. 185; *Dean v. Tucker*, 58 Miss. 487; *Bromwell v. Bromwell*, 139 Ill. 424 (28 N. E. 1057); *Smith v. Cuff*, 3 Nova Scotia, 12.

In the last case cited, the court refused to enter judgment against a defaulted defendant served by publication, upon a claim which appeared on its face to be barred by the statute of limitations. As will be seen from the examination of the foregoing authorities, the subject of pleading as relating to the statute of limitations has been churned into much confusion and inconsistency. This is to be accounted for in part by the fact that in an early day the courts were disposed to look upon the defense of the statute of limitations as unconscionable. They there-

fore throttled it when they could and treated it as fully waived unless the defendant set it up promptly and accurately. It was not permitted to set it up even by amendment. This condemnation has long ago passed away, and this defense is now recognized as having its own substantial merit. But the old precedents have continued to obtrude themselves into the decisions, and this has resulted in excessive technicality without any apparent reason therefor. There is nothing in our own statute nor in our previous decisions which puts this defense in dishonor or subjects it to any rule which is not applicable to any other affirmative defense.

There is a further consideration at this point that ought not to be overlooked. We are awarding a partial reversal as to a few items. We are holding also that these items are in truth barred by the statute of limitations, but that the defendant has failed to claim the benefits of the statute in a proper way. The case must therefore be remanded to the trial court for further hearing. Will not the defendant then be entitled to avail itself of the statute of limitations by appropriate amendment? Must we now close our eyes to the self-evident and go through the mere form of a reversal in order to maintain a hard and fast rule as to the method of pleading the statute of limitations?

In view of the implied confession and avoidance pleaded in the petition, I think the defendant should be deemed to have sufficiently raised the plea of the statute of limitations by his motion at the close of the evidence, and that the plaintiff was in no manner prejudiced by the method adopted.

FROHARDT BROS. and DROGE BROS., v. W. A. DUFF,
Appellant.

Statute of frauds: WHEN QUESTION OF FACT. Where the chief purpose of a promisor is to promote or subserve some interest of his own his oral promise to pay the debt of another is not within the statute of frauds, even though the original debtor is not released; but where his object is to become a surety or guarantor for another his obligation must be in writing to be enforceable; and if the evidence is conflicting as to whether the promise is independent or collateral the question is for the jury.

Trial: WITHDRAWAL OF COUNTS: EXCLUSION OF EVIDENCE ON RETRIAL.

2 Where certain counts of a petition are withdrawn from the jury and no appeal is taken from the court's action in that respect, it is proper on a retrial of the action to exclude evidence in support of the withdrawn counts.

Evans, J., dissenting in part.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

TUESDAY, APRIL 9, 1912.

ACTION on alleged oral promise by defendant to pay to plaintiffs the amount of certain claims held by plaintiffs against one Whitsett. The defendant relied upon the statute of frauds, and the court submitted the case to the jury to determine whether the agreements of defendant were original and absolute undertakings to pay to plaintiffs the amounts of their respective claims against Whitsett, or whether it was a collateral undertaking merely to see that the claims against Whitsett were paid, if he did not pay them. There was a verdict against defendant in favor of Frohardt Bros., and one in favor of defendant against Droge Bros., and judgment was rendered accordingly, from

which defendant appeals as to the judgment against him, and Droge Bros. appeal from the judgment as against them. Defendant's appeal having been first perfected, he is treated as the appellant.—*Affirmed.*

Reed & Robertson, for appellant.

Flickinger Bros., for appellees.

McCLAIN, C. J.—Frohardt Bros. and Droge Bros. held two separate and independent claims against one Whitsett, and were threatening separately to attach Whitsett's property, consisting of a livery stock, on which defendant had a chattel mortgage, and of which he had possession. Thereupon it is alleged that defendant promised to each of the respective creditors of Whitsett that if they would refrain from attaching Whitsett's property in defendant's hands and attacking the validity of defendant's mortgage he would pay their respective claims, and this action is founded upon such oral promises. While the causes of action of the two plaintiffs are distinct and separate, they were, without objection, allowed to proceed as co-plaintiffs in this action. By separate appeals, the correctness of these two different portions of the final judgement is questioned. The appeal of the defendant from the judgment against him in favor of Frohardt Bros. will be first considered.

I. There was evidence tending to show that when Frohardt Bros. were threatening to attach the property of Whitsett, including the livery stock of which the defend-

ant had possession, at least the greater part of it covered by a chattel mortgage to defendant, the defendant urged the plaintiffs not to levy the attachment, as it would interfere with his (defendant's) business, and also injure Whitsett, and that defendant promised, if Frohardt Bros. would not levy

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such attachment, he (defendant) would pay their claim, and that Frohardt Bros. refrained from attaching Whitsett's property in defendant's hands, but did subsequently secure a judgment against Whitsett for the amount of their claim; and, further, that defendant was interfered with in his possession of Whitsett's property. The concrete question now presented is whether a finding by the jury that defendant did make an absolute independent agreement on his own behalf that if Frohardt Bros. did not levy an attachment on Whitsett's property in defendant's hands the defendant would pay the amount of Whitsett's claim to Frohardt Bros., and compliance with such agreement on the part of Frohardt Bros. was sufficient, notwithstanding the statute of frauds, to justify a judgment in favor of Frohardt Bros. against defendant on his oral promise. The same question in another form is involved in the claim for defendant that, under the evidence, the court erred in leaving it to the jury to say whether the oral promise of the defendant to pay to Frohardt Bros. the amount of their claim against Whitsett was an absolute and independent promise, rather than a collateral promise to pay Whitsett's debt.

This case is one of a class as to which it has been difficult for the courts to state any clear and consistent rule for the application of the statute of frauds, so far as it prohibits the introduction of oral evidence to prove a contract to pay the debt of another. There has been no difficulty in holding that agreements of guaranty, whether made before or after the guaranteed debt has been contracted, are covered by the statute, even though based on an independent consideration of detriment to the creditor or advantage to the guarantor. That is to say, adequate and lawful consideration for an oral contract of guarantee does not take it out of the statute. On the other hand it is well settled (and no citation of authorities in support of the proposition is necessary) that an independent agree-

ment on a distinct consideration to assume and discharge the debt of another may be valid, notwithstanding the statute, as, for instance, where, on such new promise the original debtor is released, or where the promisor agrees to discharge the debt of another in consideration of his being relieved from liability for his own obligation to the creditor, to whom the debt of such other person is owing. Thus it appears that there may be a binding oral promise to pay an amount due to the promisee from a third person, if supported on a good consideration, but that not every promise to pay the amount due from another to the promisee, although supported on a legal and adequate consideration, is enforceable. The distinction between these two classes of cases seems to be this: Does the promisor, for a consideration of advantage to himself, make an absolute and independent promise to pay the amount due to the promisee from a third person; or is his promise to pay the amount due from such third person merely collateral to the third person's obligation? On the one hand, the release of the original debtor is sufficient to show that the promise to pay his debt is a new, original, and independent promise. On the other hand, if the promisor merely undertakes to pay the debt of another in the event that such other person does not pay it, then the promise is collateral, and the legality and adequacy of the consideration does not take it out of the statute of frauds.

While there was at one time, especially in the English courts, an inclination to treat as collateral, and therefore as within the statute of frauds every promise to pay the amount of another's debt, the unmistakable weight of the more recent cases, especially in this country, has been in favor of sustaining, as against the statute of frauds, an oral promise to unqualifiedly and absolutely pay another's debt on a consideration of advantage accruing to the promisor from such a promise. As was said in *Emerson v. Slater*, 22 How. 28, 43 (16 L. Ed. 360):

Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of a debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

And in *Nugent v. Wolfe*, 111 Pa. 471 (4 Atl. 15, 56 Am. Rep. 291), this language is used, quoted with approval in *Bailey v. Marshall*, 174 Pa. 602 (34 Atl. 326):

It is difficult, if not impossible, to formulate a rule by which to determine, in every case, whether a promise, relating to the debt or liability of a third person, is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt, for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding, unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

The following cases support the general proposition that, if the leading object of the promisor is not to become surety or guarantor of another, but to promote or subserve some interest of his own, his oral promise to pay

the amount of another's debt is not within the statute of frauds, even though the original debtor is not released: *Tindal v. Touchberry*, 3 Strob. (S. C.) 177 (49 Am. Dec. 637); *Smith v. Delaney*, 64 Conn. 264 (29 Atl. 496, 42 Am. St. Rep. 181, and note); *Joseph v. Smith*, 39 Neb. 259 (57 N. W. 1012, 42 Am. St. Rep. 571); *Marrow v. White*, 151 N. C. 96 (65 S. E. 746); *Lorick v. Caldwell*, 85 S. C. 94 (67 S. E. 143); *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859 (98 C. C. A. 229); *Oldenburg v. Dorsey*, 102 Md. 172 (62 Atl. 576, 5 Ann. Cas. 841).

If the evidence is in conflict as to whether the promise is independent or collateral, the question is for the jury. *Davis v. Patrick*, 141 U. S. 479 (12 Sup. Ct. 58, 35 L. Ed. 826); *McGowan Commercial Co. v. Midland Coal & Lumber Co.*, 41 Mont. 211 (108 Pac. 655); *Johnson v. Bank*, 60 W. Va. 320 (55 S. E. 394, 9 Ann. Cas. 893, and note. Some of the more recent of our own cases on the subject support the rule above announced. *Pratt v. Fishwild*, 121 Iowa, 642; *Blake v. Robinson*, 129 Iowa, 196; *Harlan v. Harlan*, 102 Iowa, 701; *Carraher v. Allen*, 112 Iowa, 168; *Miller v. Adams*, 142 Iowa, 515; *Helt v. Smith*, 74 Iowa, 667.

It is true that in some of these cases the facts involved did not necessarily require the announcement of such a rule as we are now recognizing. But we can not properly disregard the repeated announcement of such rule as having been made through misapprehension and oversight. Unless there are cases in this court which, as applied to the facts of this case, necessarily lead to a different result, we should give heed to our previous repeated statement of a general principle applicable to the case, although it may have been made under circumstances not giving rise to the precise question now before us. We fail to find among the cases in this court relied upon for appellant any deci-

sion, as to this branch of the statute of frauds, inconsistent with the general proposition already stated.

In *Westheimer v. Peacock*, 2 Iowa, 528, the statute of frauds was applied in an action brought against a father who had orally promised to pay his son's debt; but the court said: "There is nothing to show that the defendant, when he made the promise, had in view or secured a benefit which accrued immediately to himself. On the contrary, his object was to obtain forbearance or benefit to his son. If for his own benefit, the promise would not be within the statute; if for the debtor, it would. And this distinction we think important, and one that is clearly recognized by the authorities." In *Sternburg v. Callanan*, 14 Iowa, 251, the question was whether the defendant partnership had assumed the individual debt of one of the partners, and the court held the partnership was not bound, because there had been no novation, and held the jury should have been instructed that an oral promise by one of the partners to pay the individual debt of another partner could not be established by parol; but the question of the statute of frauds was not otherwise discussed. In *Kauffman v. Harstock*, 31 Iowa, 472, it was simply held that an agreement, upon certain contingencies, to step into the place of another, as to his debt, and to hold the creditor harmless, was within the statute of frauds. In *Dee v. Downs*, 57 Iowa, 589, was involved only the question whether an agreement to become surety for another was within the statute. In *Vaughn v. Smith*, 65 Iowa, 579, it was held that there was no new and independent consideration for the oral promise to answer for the debt of another, and that it was therefore within the statute of frauds. In *Walker v. Irwin*, 94 Iowa, 448, it was pointed out that the oral agreement relied upon was not an original agreement, but one obligating the promisor to step into the place of the debtor and pay his liability upon certain conditions, and that it was therefore collateral, although the

contingencies contemplated had happened; and it was said that the defendant received no personal benefit, so that his obligation was without consideration. In *Schaffs v. Wentz*, 100 Iowa, 708, the oral promise relied upon was held to be collateral, and therefore within the statute. In *Griffin v. Hoag*, 105 Iowa, 499, the oral promise relied on was held unenforceable, because a mere naked promise, without consideration of detriment to the promisee or advantage to the promisor. In *Winburn v. Fidelity L. & B. Ass'n*, 110 Iowa, 374, it was held by a divided court that an oral acceptance by an agent of orders drawn upon him for his principal's funds would not render his principal liable, in the absence of the existence of funds in the hands of the agent out of which the orders could be paid. It is difficult to find any application of the case to the question now under consideration. In *Regan v. Kirk*, 140 Iowa, 302, it was held, without discussion, that reliance by the promisee on an oral promise to pay the debt of another would not render such promise enforceable.

None of these cases are at all inconsistent in principle with the rule that an oral agreement, entered into on consideration of benefit to the promisor, and relied upon by the promisee to his detriment, to pay to the promisee the amount of the claim of the latter against a third person may be enforced, without regard to whether the effect of the agreement is to release such third person from his liability; and we reach the conclusion that the court properly submitted to the jury the question whether the oral promise of the defendant to pay to Frohardt Bros. the amount of their claim against Whitsett was an original and independent obligation, entered into on account of anticipated benefit to defendant, or whether it was merely a collateral agreement to pay Whitsett's debt, and that the judgment against the defendant in favor of Frohardt Bros. should be affirmed.

II. The appeal of Droge Bros. is predicated on

a refusal of the trial court to allow them to introduce evidence on two other counts of the original petition. It

2. TRIAL: with-
drawal of
of counts:
exclusion of
evidence on
retrial.

appears that, as originally filed, the petition was in two counts, one alleging partnership between defendant and Whitsett, and the other charging fraud and conspiracy between

them to put the property of the latter beyond the reach of creditors. Subsequently an amendment was filed to the petition, alleging an independent promise of defendant to pay Whitsett's debts to each of the plaintiffs. 'When the case came on for trial, evidence was presented in behalf of the plaintiffs under the petition as thus amended, but on motion of defendant the court withdrew from the jury the consideration of the issues raised by denial of the first and second counts, and submitted to the jury only the issue as to an independent promise. The jury disagreed on this submission, and when the case came on for retrial the judge held that the previous ruling as to the first two counts constituted in effect an adjudication, and that there could be a trial only on the third count. The record as presented for Droge Bros. shows that the trial court found a determination as to the first and second counts which did in fact constitute an adjudication, and, if so, plainly those counts were not proper subject-matter for further evidence in the case. The mistrial was only as to the issue arising under the third count; that is, the amendment. There was no mistrial as to the first and second counts; for they were never submitted to the jury at all.

The final adjudication may consist of many judgments, or, when the claim consists of several parts or items, such judgments may be for either of the parts, or any specific part or item, of such aggregate claim, and against him on the other part thereof. Code, section 3769. It is not necessary now to determine whether the final adjudication as to the first and second counts was in

such form that a separate appeal might have been prosecuted from it, or whether it was an incidental ruling of the trial court, which might be reviewed on appeal from the final judgment. No separate appeal was taken, and on the present appeal there is no claim of error as to the ruling. Under these circumstances, Droge Bros. can not complain of the action of the trial court in refusing to receive evidence on the last trial in support of the first two counts of the petition.

The judgment of the trial court is therefore, on both appeals, *Affirmed*.

EVANS, J. (dissenting in part).—I do not agree to the first branch of the majority opinion. It goes beyond any previous decision of this court. In practical effect, it is an evasion of the statute of frauds. My views are expressed in the former opinion filed in this case, which can be found in 132 N. W. 31.

In the matter of the Statement of Consent for the Sale of Intoxicating Liquors in Fort Dodge, Webster County, Iowa, R. E. ANDERSON, et al., v. Board of Supervisors of Webster County, Iowa, Defendants, T. H. WRIGHT et al., Interveners, Appellants.

Intoxicating liquors: CONSENT: APPEAL: INTERVENTION. Any citizen
1 may intervene under the mulct law, on an appeal to the District Court from a finding that the statement of consent to the sale of liquor was insufficient, and defend the action of the board.

Same: STATEMENT OF CONSENT: WITHDRAWALS. Withdrawals of sig-
2 natures from a statement of consent, or withdrawals of withdrawals, will not be considered after the board has begun the canvass of the petition.

Appeal from Webster District Court.—HON. C. G. LEE,
Judge.

TUESDAY, APRIL 9, 1912.

THE facts are stated in the opinion.—*Reversed.*

M. S. Odle, for appellants.

Price & Joyce, for appellees.

SHERWIN, J.—In December, 1910, there was filed with the county auditor of Webster county a statement of consent, asking that the sale of liquors be permitted in the city of Ft. Dodge. This statement had 1,198 signatures. Due and legal notice was given that the board of supervisors would begin the canvass of said statement at 8 o'clock a. m., January 14, 1911. The board met at the designated time, for the purpose of canvassing said statement. Just before the board took up the canvass of the statement, 206 written withdrawals from said statement were filed, 204 of which were afterwards allowed, which withdrawals were in the following form, so far as same are material to our present inquiry: "We . . . hereby request that our signatures be removed from said petition and not counted thereon, nor in any manner considered in favor of said petition." After these withdrawals were filed, but before the canvass was commenced, twenty-one withdrawals of withdrawals were filed, and on the same day, but after the canvass was commenced, other withdrawals of withdrawals were filed. The board did not complete the canvass on the 14th, and adjourned to the 18th of January. On that day, additional withdrawals of withdrawals were filed, making the total number of withdrawals from withdrawals seventy-nine. The board, by final resolution, rejected all of the withdrawals from withdrawals, allowing 204 of the withdrawals from the statement, and found the statement insufficient, because it did not bear the requisite number of signatures. The petitioners, the plaintiffs herein, appealed

to the district court, and in that court the appellants herein, the interveners, filed a petition, asking that they be allowed to intervene and resist the appeal of the petitioners, Anderson and others, and they were permitted to so intervene. The case was then tried in equity, and the statement of consent was found sufficient by the district court; the court holding that the withdrawals from withdrawals should be considered in determining the number of signatures to the statement of consent. The interveners appeal from such finding, and will be called appellants herein. The petitioners, Anderson and others, appealed from the order permitting the appellants to intervene; but they will be designated herein as appellees.

The appellees contend that there is no authority in the statute for the intervention, and that interveners' appeal should therefore be dismissed. We can not give our assent to this proposition. The mulct statute throughout recognizes the special interest therein of every citizen, and has attempted, at least, to provide a way by which any citizen of the county, wherein the protection of the statute is sought for the sale of liquor, may test the legality of all proceedings necessary to create the bar provided for therein. Section 2450 of the Code expressly provides that any citizen of the county may appeal from the action of the board of supervisors finding the statement of consent sufficient; and the same section also provides for an appeal by any party aggrieved from the finding of the board that the statement is insufficient. The evident purpose of the statute is to give the citizen, who is opposed to the sale of intoxicating liquors, and the party, who wants to sell it, or have it sold, under the provisions of the mulct law, both an opportunity to be heard in court; and, while the section does not, in express terms, say that the citizen may appear in the district court when an appeal has been taken from an order of the board, finding the statement insufficient, was

1. INTOXICATING
LIQUORS: con-
sent: appeal:
intervention.

think that the spirit and real intent of the statute is to permit the citizen to defend the action of the board in an appeal which shall be taken by the other side of the controversy. See, as sustaining this view, *Hemmer v. Bonson*, 139 Iowa, 210; *Brickley v. Westphal*, 134 Iowa, 266. Furthermore, as the mulct statute creates in every citizen an interest as to whether it shall, or shall not, be effective in a given locality, we are inclined to the opinion that the interveners were properly before the district court, under the provisions of Code, section 3594.

The city poll books of the election were all filed in the auditor's office, without designation by the clerks or judges of election as to which were especially intended for permanent record in the auditor's office; and on the trial the district court admitted a book, or books, which the auditor had marked "City Clerk's." As a determination of the correctness of this ruling can not, in any way, affect the result in this case, we do not determine the question. Nor do we determine whether the twenty-one withdrawals from withdrawals, which were filed before the canvass was commenced, should have been disregarded by the district court, as they were by the board of supervisors; for, even if it be conceded that they were properly considered by the district court as removing from the original withdrawals twenty-one names, it could not change the final result here. All of the other withdrawals from withdrawals were filed after the canvass of the statement had been commenced, and, under the rule recently announced *In re Consent to Sell Intoxicating Liquors in City of Oskaloosa*, 155 Iowa, 149, they should not have been given effect by the court; and if they are not effective to change the number of original withdrawals the statement of consent was insufficient. The papers filed as withdrawals from withdrawals stated that the original withdrawals were not expressions of true desire in the matter, and "that

it is my firm and final desire in the matter that my name remain on said statement of consent, and that I be counted as such by the board of supervisors of Webster county, Iowa, when said statement is canvassed." Counsel seek to avoid the effect of the holding in the *Oskaloosa case* by attempting to distinguish between the two forms of withdrawal from withdrawal; but in our judgment, no such distinction can justly be made. The effect of both would be the same. The *Oskaloosa case* was fully considered, and we have no inclination to depart from the rule therein announced, after full discussion in the opinion. The judgment of the trial court must therefore be *reversed*.

In the matter of the Appeal of B. W. MAYDEN from the action of the CITY COUNCIL of the CITY of DES MOINES, IOWA.

Municipal corporations: ASSESSMENT: APPEAL. On appeal from
1 the levy of a paving assessment the property owner can not for the first time raise the question of the validity of a modification of the paving contract.

Same: CONTRACTS: MODIFICATION: APPEAL: REVIEW. Where the modification of a contract had been assented to and its provisions performed, absence of the signature of one of the parties was not material as bearing on its validity; and where the record on appeal failed to show the original paving contract, or whether payment was to be made in a lump sum or according to area, the propriety of a ruling sustaining a modification of the original contract could not be reviewed.

Same: PRESUMPTION: OBJECTION TO ASSESSMENT. Where a city induced a contractor to modify his original paving contract it
3 will be presumed that the modification was for the public interest; and where the agreement as modified was literally carried out, a property owner objecting to an assessment must first impeach the modification before he will be heard to object that the original contract was not performed.

Appeal from Polk District Court.—HON. JAMES A. HOWE, Judge.

TUESDAY, APRIL 9, 1912.

APPEAL from a paving assessment ordered by the city council of Des Moines. Upon a hearing in the district court, the assessment was confirmed, and the appeal dismissed. From such order, the property owner has appealed to this court.—*Affirmed.*

R. G. Patton, for appellant.

Robert Brennan and James M. Parsons, for appellee.

EVANS, J.—The appellant is the owner of property abutting on Thirty-Sixth street. In July, 1909, after due preliminary proceedings, the city council of Des Moines ordered an asphalt pavement to be laid on Thirty-Sixth street beginning at the north side of Grand avenue and extending north to Woodland avenue; and a contract was duly let to that effect. This contract was fully performed in all respects save in the alleged failure to pave the intersection of Ingersoll avenue. The appellant appeared before the city council and made the following objection: "Objects to the levy of a special assessment for the pavement in front of said property for the reason that the same was not constructed in accordance with the plans and specifications contained in the resolution of necessity or in the contract as let in this: That the contract called for the paving of Thirty-Sixth street from the south side of Woodland avenue to the north side of Grand avenue, and Thirty-Sixth street where it intersects Ingersoll avenue has not been paved. Dated this 22d day of November, 1909. B. W. Mayden." Appellant's lot is located near

Woodland avenue and is not contiguous or adjacent to Ingersoll avenue.

At the trial in the district court, the appellant introduced the record proceedings and rested. These proceedings are concededly regular in form. They were in no

1. MUNICIPAL
CORPORATIONS:
assessment:
appeal. manner assailed in the objection filed before the city council. No direct evidence is to be found in the record before us to the effect

that the Ingersoll avenue intersection has not been paved. It appears only inferentially. We have before us the plat upon which the order of assessment by the city council was based. This plat indicates that the intersection of Ingersoll avenue is covered with railway tracks. The record also contains a purported written contract between the city and the contractor providing for the modification of the original contract to the extent of omitting the pavement at the intersection between the curb lines of Ingersoll avenue. This includes an apparent distance, according to the scale of the plat, of about sixty feet, and includes that part of Ingersoll avenue which is covered by the railway tracks. It is urged in argument that this later contract was of no effect because it had not in fact been signed by the contractor. Such contract, however, was in no manner challenged in the proceedings before the city council nor in the petition filed on appeal in the district court. The appellant therefore is in no position to raise the question here for the first time.

We may, however, say that if the contract was assented to by the contractor, and its provisions were acceded to and fully performed by him, the absence of his signature

2. SAME: con-
tracts: modifi-
cation: ap-
peal: review. from the writing itself is not very material. The specific objection made before the city council was that the contract was violated

by the failure to pave the Ingersoll intersection. But the evidence introduced by the appellant in the district court disclosed that the omission of this intersection was in ac-

cord with the contract in its modified form. There is nothing in the record before us to show that the contract in its present form could not have been properly entered into in the first instance with this contractor. The record does not contain the final resolution under which the pavement was ordered, nor does it contain the notice to bidders, nor the plans and specifications upon which bids were made and received. The original contract is set out only partially. It is not set out to the extent of showing the basis of compensation, nor whether the contractor was to be paid in a lump sum or to be paid per square yard according to the area.

We can not say, therefore, upon this record, that there was any failure upon the part of the contractor to comply with his contract. Nor can we say that the city council exceeded its power in requesting the omission of the railway crossing from the operation of the contract.

Looking at the case from another point of view, whether there was a substantial performance of the contract on the part of the contractor was a mixed question of law and fact. For aught that appears in this record, the benefits conferred upon appellant, and the burden imposed upon him, were in no manner affected by the omission. The record indicates that the city council requested the omission, and that it obtained from the contractor a waiver of all claims for compensation or damages. Presumably, therefore, the city council deemed the purported omission to be in the public interest.

The contract in its modified form having been literally performed, it was incumbent upon the appellant to impeach this modification by proper objection and evidence below before he can be heard here to say that the original contract was not performed.

The order of the district court must therefore be *affirmed*.

MAY KAYNOR, Appellant, v. THE CITY OF CEDAR FALLS,
H. JACOB PFEIFFER, J. E. THOMAS, MICHAEL
BURKE, H. W. LARSEN, J. W. WILIMEK, SHEPHERD
PHILPOT, M. F. AREY, C. M. OVERMAN, CEDAR FALLS
CEMENT COMPANY and C. H. WISE.

Municipal corporations: CONSTRUCTION OF WALKS: GRADE. The
1 statute providing that a permanent sidewalk shall not be built
until the bed of the walk has been graded does not require
that the bed of the walk shall be precisely at grade; it may be
desirable that the top of the walk when completed shall be some-
what higher than the established grade, for drainage or other
reasons. So that specifications for a walk providing that the
city should make the excavation necessary to bring the street to
grade, the contractor to make such excavations as would be dis-
placed by the walk, were in accordance with the statute.

Same: ASSESSMENTS FOR CROSS WALKS: INJUNCTION. The statutes
2 do not authorize an assessment for cross walks against corner
or other lots; so that an ordinance requiring the owners of
corner lots to construct their walks in front of their property
through to the curb line, was to that extent void and the attempt
to force property owners to construct the walk between the lot
line and the curb line in the manner considered, constituted a
fraud on such owners.

Appeal from Black Hawk District Court.—HON. FRANK-
LIN C. PLATT, Judge.

TUESDAY, APRIL 9, 1912.

ACTION to enjoin the levy, as a specific assessment,
of the cost of constructing a sidewalk against plaintiff's
lot. On hearing the petition was dismissed. The plaintiff
appeals.—*Reversed.*

Hemenway & Martin, for appellant.

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J. B. Newman, for appellees.

LADD, J.—The plaintiff is owner of lot 4 in block 14 of the original plat of the town of Cedar Falls, situated at the corner of Clay and Fifth streets, and on May 11, 1909, the council of defendant city adopted a resolution that a permanent sidewalk five feet wide be made on the north side of Fifth street along said lot, to be constructed of cement, and that, unless built within thirty days, the city would cause the same to be constructed and assess the expense against the lot. Of this, the plaintiff was duly notified, and through her attorneys requested that the proper grade be established. The mayor responded: "Will give you grade any time your contractor is ready for permanent walk, lot 4, block 14." On June 19th following, the street committee of the city council advertised for the bids for the construction of 4,530 squares of permanent cement sidewalk on six different streets, including Fifth street between Clay and Olive streets, but not particularly describing that to be put in along plaintiff's lot. The Cedar Falls Cement Company obtained the contract, and, though duly notified that plaintiff would resist any attempt to assess the cost of constructing a sidewalk along the lot, proceeded to put in the same according to specifications.

The city council was about to assess the cost against plaintiff's lot, when this action to enjoin that body from so doing was begun. The petition alleged the foregoing facts, and "(5) that, by provision of ordinances and resolutions of the city council of the city of Cedar Falls, no person is authorized or permitted to construct such cement sidewalks in the limits of said city of Cedar Falls, except they have therefor obtained a license to make such constructions, for which a certain fee is demanded and a bond required, conditioned that such licensee will, in the prosecution of his work, observe all the regulations and

rules, relating to the same, made and adopted by the city council, and such directions as may be given him by the city engineer; (6) that the curb line, as established by the ordinances of the city upon Fifth street, is ten feet from the lot line and three feet and eight inches from the outer line of the sidewalk as ordered to be constructed, and on Clay street the curb line is sixteen feet from the lot line and nine feet eight inches from the outer edge of the walk as ordered to be constructed; (7) that the council and executive officers of the city have heretofore insisted that, in the construction of a sidewalk in front of corner lots similarly situated as plaintiff's lot, the owners thereof should build the crosswalk from the corner of said lot to the curb line, and, in order to compel the owners of like property to build a walk in front of their property, the city council has passed a resolution, and enforced the same, making direction and regulation in such respect, forbidding the engineer employed by the city, whose duty it is to define and lay out the grades, to establish and point out grades, unless such owners shall agree to construct and pay for the crosswalk, as above described."

The answer admitted these paragraphs of the petition and also admitted "that the officers of said city have insisted that, in the construction of sidewalks in front of corner lots, the owners should build the walk from the corner of said lot to the curb line, and, in order to compel the owners of such property to build a walk in front of their property, the city council has passed a resolution, and enforced the same, making direction and regulation in such respect, forbidding the engineer employed by the city to establish and point out grades, unless such owners shall agree to construct and pay for the walk, as above described."

By ordinance No. 221, "owners of corner lots are required to construct and continue sidewalk at the radius up to the established curb lines of the street." Section 4

of Ordinance 31 authorized the council, by resolution, to order the construction of sidewalks: and section 9 thereof provided that, "if the owner or owners of any lot or lots or part of any lot abutting on said contemplated improvements shall refuse, fail, or neglect to have any sidewalk done by the time limited by the order of the city council, it shall be the duty of the street committee to procure the same to be done, at the expense of the owner, with or without contract as they may deem best."

Numerous objections are raised against these proceedings; but all of these, save such as may be regarded as jurisdictional, were waived, unless fraud was shown; for that such objections were not filed with the city clerk. Section 791-a Code Supplement. This disposes of all but two objections.

I. Under Ordinance No. 31, the city was not authorized to construct the walk, unless the owner "refused, failed or neglected" to do so, and neither might lay a permanent walk until the "bed of the same shall have been graded so that, when complete, such sidewalks will be at the established grades."

2. MUNICIPAL
CORPORATIONS:
construction
of walks:
grade.

Section 779, Code Supplement. See *Burget v. Town of Greenfield*, 120 Iowa, 432; *Gallaher v. City of Jefferson*, 125 Iowa, 324; *Bowman v. City of Waverly*, 155 Iowa, 745. The evidence disclosed that the street, from line to line, had been brought to the grade as established by an ordinance of the city; but the earth where the sidewalk was to be constructed had not been removed, so that the top thereof, when laid, would conform to such grade. The specifications provided that "the city will make the excavation necessary to bring the street to grade and the contractor shall make such excavations as shall be displaced by a sidewalk proper and the specified foundation," and under the contract between the city and the contractor the latter undertook to comply with these requirements. We regard this as a correct construction of the statute.

It is not likely that the Legislature intended that the top of all permanent sidewalks conform precisely with the established grade. The statute does not so state, and the universal custom is to the contrary. The manifest purpose is that the earth where the sidewalk is to be laid—the proposed bed thereof—be first brought to grade before the municipality may order the construction of the walk. While the walk must conform to the grade, this does not mean that the top of the walk shall be precisely at grade. The city may conclude that it will be better in the matter of convenience, drainage, and protection against general travel that it be constructed in conformity with, but somewhat higher than, the grade of the street; and there is nothing in the statute to the contrary. When the earth has been brought to the established grade, the removal of any earth essential to its proper construction is merely incidental to the laying of the sidewalk, and may be regarded as so connected therewith that it may be deemed a part of such construction. The statute was complied with in this respect.

II. Objections are not to be deemed waived where fraud is shown. Section 791-a, Code Supplement. The petition does not allege in so many words that the defend-

2. SAME: assess-
ment for
cross walks:
injunction.

ants, in the procedure adopted, were guilty of fraud; but the facts recited in the petition and admitted in the answer clearly establish this charge. Section 779, Code Supplement, confers power on the city to assess the costs of the construction of permanent sidewalks on the lots or parcels of land in front of which the same shall be constructed. This does not mean that it may also assess the cost of crosswalks against the corner or other lots. As seen from the recital of facts, the city, by ordinance, required the owners of corner lots to continue the sidewalks in front of their lots to the curb line. If this might be done, then there is no reason why the corner lot owners might not be com-

pelled to construct the walk entirely across the street. The power to assess the cost of any portion of the crosswalk is not conferred upon the city or town, and therefore this portion of the ordinance was void, and it seems to have been so understood by the defendants; for, before a contractor was permitted to construct walks, he was required to obtain a license and give bond, conditioned that, in the prosecution of his work, he would observe all the rules and regulations adopted by the city council, and such directions as might be given by the city engineer, among which was that he would not construct a walk, unless he did so to the curb line. The engineer of the city was forbidden by the city council from performing the duty of defining and laying out grades, unless the owner should agree to construct and pay for the crosswalks described. The officers of the city, in order to compel owners of property to build crosswalks, passed a resolution, and enforced the same, forbidding the engineer of the city to establish or point out grades, unless the owner shall agree to construct and pay for such crosswalks.

It is not merely a case of a void ordinance, but of an attempt on the part of city officers to compel obedience thereto, and extort the payment of money, without the semblance of authority for so doing. That such a course amounted to a fraud is a proposition too clear to require argument, and because thereof the court should have enjoined the levy of the assessment against plaintiff's lot.—*Reversed.*

URSULA S. YEAGER, Administrator of the Estate of JOSEPH J. YEAGER, Deceased, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Railroads: NEGLIGENT RATE OF SPEED. The question of whether a railway engine is being operated at a dangerous rate of speed is to be determined by the circumstances: Thus where a brake-

man was riding on the front of a switching engine that was pushing a coal car and approaching other cars on the same track, a finding that six to eight miles an hour was a negligent and dangerous rate of speed would not have been without support.

Same: SUBMISSION OF ISSUES: APPEAL. Where the petition charged 2 that the engineer and fireman were negligent in running the engine, and in failing to stop in time to have avoided the accident and in failing to keep a lookout, making no separate charge of negligence against the fireman, and defendant did not ask that the allegations of negligence against them jointly be divided and separately submitted, the defendant could not contend on appeal that there was no evidence to support the alleged negligence of the fireman.

Same: CONTRIBUTORY NEGLIGENCE. Contributory negligence will not 3 defeat recovery for a personal injury unless it causes or contributes to the injury.

Same: DAMAGES. The amount of recovery for injuries occasioning 4 death is governed largely by the earning capacity and expectancy of the deceased; and in this case a judgment of \$9,000 for the death of a brakeman is upheld.

Appeal from Emmet District Court.—HON. A. D. BAILIE,
Judge.

WEDNESDAY, APRIL 10, 1912.

ACTION to recover damages to the estate of Yeager resulting from his death, which is alleged to have been caused by the negligence of defendant, in whose employment he was engaged as brakeman when he was injured. There was a verdict for the plaintiff, and defendant appeals.—*Affirmed.*

Carroll Wright, J. L. Parrish, and C. W. Crim, for appellant.

M. J. Groves, and J. G. Myerly, for appellee.

McCLAIN, C. J.—This case was before this court on a

former appeal (148 Iowa, 231), and a judgment for plaintiff was reversed on the ground that allegations of negligence were submitted to the jury which were not supported by any evidence. It was held, however, on the former appeal, that some of the allegations of negligence were supported by sufficient evidence to take them to the jury.

On the trial from which this appeal is taken, the facts disclosed by the evidence did not differ from those disclosed on the former appeal in any respect material to our present consideration of the case, and it is unnecessary to restate them. One correction, however, in the former statement, seems necessary to make the situation of the parties at the time of the accident perfectly clear. As the switch engine pushing a coal car in front of it and moving to the eastward passed from the main track to side track No. 1 approaching the freight cars which had previously been left on that side track and with which the coal car collided, causing the death of Yeager, the deceased, who was on that night the "field" brakeman charged with the duty of looking after the cars which were to be handled, was on the north end of the footboard at the front of the engine, that is, on the left-hand side as the engine ran eastward, and next to the coal car; while Brisbin, the other brakeman, whose duty it was on that night to remain with the engine, was on the south end of the running board, that is, on the right-hand side, in a position to give signals to the engineer. From the position which Yeager occupied, it was impossible to signal the engineer, whose proper position was on the right-hand side of his engine cab, that is, at the south side as the engine ran east.

I. In submitting the issues to the jury, the court included the issue as to whether the engineer was negligent in causing his engine to move along the switch track at a high and dangerous rate of speed, and it is the contention

for appellant that the only evidence on the subject tended to show that the engine was being operated at a speed of some six to eight miles an hour and could have stopped within six feet, and that as matter of law this was not a dangerous rate of speed. But it is plain that the question whether the engine was being negligently operated with reference to its rate of speed must be considered in the light of the circumstances; and in view of the fact that, as the jury might have found, the engineer was causing his engine and the coal car pushed in front of it to approach other cars upon the same track, a conclusion that the rate of speed, in view of the circumstances, was dangerous and negligent, would not be without support in the evidence. If, as some of the witnesses testified, the engineer knew, or under the circumstances ought to have known, that he was approaching cars standing on the track, for the purpose of pushing such cars ahead of the coal car which was attached in front of the engine, then it was clearly negligence on his part to operate the engine at such a rate of speed as to cause the coal car to come in contact with the standing cars with such violence as to crush the deceased where he stood between the coal car and the engine on the footboard.

II. The contention on the part of appellant that the court submitted to the jury an issue as to the negligence of the fireman, Wilkins, in continuing to run the coal car and the engine along the switch track until the coal car collided with the other cars on the track, and that there is no evidence of the negligence of Wilkins, does not take into account the exact state of the record. The allegations in the petition involving the fireman were that the engineer and fireman were negligent in continuing to run the engine and car attached thereto after they had passed over the switch to track No. 1, and in failing to stop said engine and car in

1. RAILROADS:
negligent
rate of
speed.

2. SAME:
submission
of issues:
appeal.

time to prevent a collision, and that they were negligent in failing to keep a lookout, etc.; and the court submitted to the jury the question whether the engineer and fireman were negligent in continuing to run the coal car and engine along track No. 1 and in failing to stop before the collision and in failing to keep a lookout. It is clear that the negligence of the fireman was only involved so far as he was concerned with the engineer in the running of the engine. No independent negligence of the fireman was referred to or submitted. As the defendant did not ask that the allegations as to negligence of the engineer and fireman be divided or separately submitted, it is in no situation to now contend that as to the fireman alone there was no evidence of negligence. The court did not submit to the jury, as counsel for appellant assume, an issue as to whether the fireman was negligent in continuing to run the coal car and engine on side track No. 1 and in failing to stop them before the collision and in failing to keep a lookout. Under the issue as presented by the pleading and the instructions, the jury could not have understood that any separate and independent negligence of the fireman was involved, and they could not have been misled by the instructions into so assuming.

III. The principal contention for appellant is that in an instruction relating to the contributory negligence of the deceased the jurors were told that such negligence would not relieve the defendant from liability unless what deceased did or omitted to do, although it constituted negligence, was a proximate or a part of the proximate cause or causes of his death. The instruction although somewhat unnecessarily elaborate, correctly stated the law, for the negligence of the deceased must have proximately caused or contributed to his injury in order to constitute contributory negligence. No matter how negligent he may have been in what he did, such negligence would be immaterial unless with reference

3. SAME:
contributory
negligence.

to the injury it was proximate rather than remote. Counsel say that under the issues and evidence the negligence of deceased, if any, must have had proximate connection with his injury, and that, having found that deceased was guilty of some negligent act without which the injury would not have happened, then his negligence must have been proximate. This, no doubt, is a correct statement; but the instruction given had no other effect than to assist the jury in determining whether the negligent act of deceased was one without which the injury would not have happened. The suggestion of counsel that, if the jury found some other proximate cause without which the accident would not have happened, then they might be led to believe by the instruction that the contributory negligence of deceased could be ignored, is not in accordance with the plain meaning of the instruction as given.

IV. The verdict and judgment were for \$9,000, and counsel contend that the amount of the recovery is excessive and the verdict must have been the result of passion and prejudice. It is true that in some cases we have reduced a verdict for injuries resulting in death to an amount not exceeding \$6,000 to \$8,000. See *Grace v. Minneapolis & St. L. R. Co.*, 153 Iowa, 418; *Engvall v. Des Moines City R. Co.*, 145 Iowa, 560. But the court has never fixed any arbitrary limit to the amount of recovery in case of injuries resulting in death. Manifestly it can not do so, for the earning capacity of the deceased and his reasonable expectancy of life must be taken into account. The expectancy of life of the deceased in this case was greater than in the *Engvall* case, *supra*, and his earning capacity was greater than the earning capacity shown in the *Grace* case. We are not inclined to interfere with the amount of recovery allowed by the trial court and can not hold that the verdict was excessive in such sense as to indicate passion and prejudice.

The judgment is therefore *affirmed*.

L. E. and E. VALENTINE, Appellees, v. FREDERICK WIDMAN, Appellant.

Drainage: SURFACE WATERS: DIVERSION. The right given a landowner to drain into a general course of natural drainage does not authorize him to gather the water on his own land, which would naturally flow in another direction, and discharge it upon the land of his neighbor.

Same: LIMITATIONS. Where a drainage system did no damage to the land of an adjacent owner until it was enlarged and extended to a pond on the owner's land, an action brought within the statutory period following the extension was timely.

Same: DIVERSION OF SURFACE WATER: DAMAGES. Where surface water naturally drained into a pond on the owner's land and the natural drainage of the overflow was in two directions, the construction of a drain carrying an increased portion of the overflow in one direction and onto the land of another, causing him substantial damage, created a liability therefor. And in case the pond was never likely to overflow, but the owner by diverting the water so as to materially increase the flow onto the adjacent land was liable for the damage; but in case the pond overflowed at times and the natural course of the water was onto adjacent premises at the point where the same was discharged by the owner's drain, then no cause of action arose because of the drain.

Same: DAMAGES: EVIDENCE: INSTRUCTIONS. Where the evidence showed that a nuisance created by a private drainage system was abated by the establishment of a drainage district, and that a portion of plaintiff's land had been flooded for a few years prior thereto by defendant's private drain, and the evidence on the question of damage would have authorized a verdict for a substantial sum on the theory that the nuisance was permanent, the verdict as returned for a much smaller sum indicated that no allowance was made for a permanent nuisance, but rather for the damage caused prior to its abatement, and defendant was, therefore, in no position to complain of evidence of damage, in support of a permanent nuisance, or of instructions permitting recovery on that theory.
Evans, J., dissenting in part.

Appeal from Hamilton District Court.—HON. C. G. LEE,
Judge.

WEDNESDAY, APRIL 10, 1912.

ACTION at law to recover damages for an alleged nuisance caused by casting water upon plaintiff's land. Trial to a jury, verdict and judgment for plaintiffs in the sum of \$106.33, and defendant appeals.—*Affirmed.*

D. C. Chase and Wesley Martin, for appellant.

Boeye & Henderson, for appellees.

DEEMER, J.—Plaintiffs and defendant are the owners of adjoining tracts of land; plaintiffs owning the lower or servient estate and defendant the higher or dominant one. Defendant's land lies north and west of that owned by plaintiffs, and in its normal condition was wet and soggy, and part of it was covered with a large slough or pond. Some of this water drained southward, but the greater part of it went off to the north and east, and into a natural stream known as White Fox creek. The south part of defendant's land drained to the south and west and onto and upon plaintiffs' land. Several years ago a five-inch tile was laid from a highway on the south up through plaintiffs' land and onto the land owned by defendant, and thereafter this was replaced by an eight-inch one. Plaintiffs claim, however, and they introduced testimony to show, that neither of these drains did any harm, as they carried no appreciable amount of water, and as they did not connect with the large pond or slough on the north part of defendant's land they made no complaint thereof, and were content to let the same remain. In the fall of the year 1905 defendant took up the eight-inch tile, deepened the ditch in which it had been laid, and extended

it up to the big pond, and laid in the ditch a twelve-inch tile, thus bringing upon plaintiffs' land a large body of water from the pond and from the land lying north of it southward where it had not previously been wont to go, and discharged it upon plaintiffs' land. Against this plaintiffs protested without avail, and finally they were, as they say, compelled to have a drainage district established to take care of this water which district was established over defendant's objections and protest, and at an expense of something like \$507 to the plaintiffs. This action is brought to recover the damages caused the plaintiffs by the digging of the ditch and the laying of the twelve-inch tile; and the damages asked in the petition for overflowing and submerging about twenty acres of plaintiffs' premises, making them untillable and unfit for cultivation. The amount of damages claimed was \$1,000. Defendant denied that the drain caused any damage, claimed a right to maintain it by reason of prescription, and also pleaded the statute of limitations. The main propositions in the case are (1) that under the testimony plaintiffs had no right to recover; and (2) that no proper testimony as to damages was offered and nothing was shown which would justify any recovery. Around these two main propositions are several collateral ones which so far as controlling will be considered during the course of this opinion.

I. For defendant, it is contended, that the tile drain complained of was laid in the natural course of drainage, and that by reason of the provisions of section 1989-a53

I. DRAINAGE:
surface
waters:
diversion.

of the Code Supplement plaintiffs have no right to complain. The section referred to reads as follows: "Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course or into any natural depression, whereby the water will be carried into some natural water course, and when such

drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation. Nothing in this act shall, in any manner, be construed to affect the rights or liabilities of proprietors in respect to running waters or streams." The law premise involved in this contention is not the subject of dispute; but the fact proposition is challenged. A careful consideration of the testimony leads us to the conclusion that a jury was justified in finding that the drain in question, while laid in the natural course of drainage from the south part of the defendant's land, was extended up to the big pond or slough and made to carry the water therefrom which did not go that way before the drain was laid, but naturally flowed off to the north and east and into White Fox creek. No purpose would be subserved in setting out this testimony, and we content ourselves with the conclusion stated. Even under the statute quoted, the defendant would have no right to gather up the water on his own land which did not theretofore have an outlet to the south, and discharge the same at a different place and in a different manner than it had gone before. *Everett v. Christopher*, 125 Iowa, 668; *Holmes v. Calhoun County*, 97 Iowa, 360; *Dorr v. Simmerson*, 127 Iowa, 551; *Sheker v. Machovec*, 139 Iowa, 1; *Wirds v. Vierkandt*, 131 Iowa, 125; *Neuhring v. Schmidt*, 130 Iowa, 401; *Hull v. Harker*, 130 Iowa, 190; *Kopecky v. Benish*, 138 Iowa, 362. The trial court properly submitted this issue to the jury, and it manifestly found for the plaintiffs.

II. The two affirmative pleas relied upon by defendant, to wit, that of prescription and the statute of limitations, may be considered together. Doubtless defendant secured the right by user and otherwise to maintain the smaller tiles which he originally laid; but a jury was justified in finding that neither of these drained any of the water from the large pond or slough, and that no actionable wrong was done to

2. SAME:
limitations.

plaintiffs' land until the ditch was extended to this pond and the large twelve-inch tile laid therein. This was not done until the fall of the year 1905, and this action was commenced October 8, 1909. There is no merit in either contention.

III. Instructions 5 and 5½, given by the trial court, are complained of. They read as follows:

(5) If the land which defendant drained by means of the tile complained of discharged its surface water into a basin or pond on defendant's land, which pond or basin had an outlet for its overflow water in both directions in the course of natural drainage—that is, part of the overflow water was naturally discharged over plaintiffs' land and part of the overflow was naturally discharged to the northeast away from plaintiffs' land, and the defendant, by tiling, caused an increased portion of said overflow water to be discharged upon plaintiffs' land, and such increased volume so materially increased the flow of water upon plaintiffs' land as to cause material or substantial damage to plaintiffs' premises which would not have resulted from water lawfully cast thereon—then defendant would be liable for such damage so caused, unless you find that plaintiffs' claim for such damage is barred by the statute of limitations.

(5½) If the land which defendant drained by means of the tile complained of discharged its surface water into a slough or pond on defendant's land, which slough or pond was so deep and large that the surface water therefrom never had overflowed, and in its natural condition the water therefrom never would overflow and be cast upon plaintiffs' land, the defendant, by constructing the improvement complained of, would be guilty of diverting such water as was carried therein, and, if the same was diverted in such quantities as to materially increase the flow on plaintiffs' land and cause substantial injury, then defendant will be liable in this case, unless he has established his defense of the statute of limitations. If, however, the said pond or basin did at times, though seldom, overflow, and the natural course of drainage for all of

the overflow water was to the south and onto plaintiffs' premises, at the place substantially where the same was discharged by defendant's tile, then plaintiffs can not complain in this case, and your verdict should be for the defendant.

These instructions seem to be correct, and, as there was testimony justifying such a charge, no error was committed in giving them. Neither the law nor good husbandry requires one to take water which does not naturally flow in his direction; and, if another gathers it up and discharges it upon him, he is liable for the damages done. Although one may be the owner of lower land, he is not bound to take water which has been diverted from its natural course of drainage. The main point of difference between counsel in this connection is not so much over the law as upon the facts. We are constrained to hold that the testimony was such as to take the case to a jury and with its conclusion we should not interfere.

IV. One of the plaintiffs' witnesses testified, without objection, that the land was worth \$75 per acre before the large tile was put in and \$65 per acre just after it was laid. When attempt, to prove this same matter by, another witness, was made, objections that it was irrelevant, incompetent, immaterial, and not the proper measure of damages were interposed, but overruled. No other damages were proved save, there was testimony, to the effect that twenty-five acres of plaintiffs' land were rendered unfit for cultivation for four years and until a public drainage district was established upon plaintiff's petition some time in the year 1909. Still another witness testified, without objection, to the difference in the value of the lands before and after the construction of the drain. A witness for defendant testified that the land was worth just as much after the large tile was put in as before; and the record shows that, since the establishment of the drainage district all the water is carried off,

4. SAME:
damages:
evidence:
instructions.

the ponds on defendant's land are dry, and the land fit for cultivation, and that plaintiffs' lands have also been reclaimed, but that, this has cost the plaintiffs more than \$500.

As bearing upon the measure of damages, the trial court gave the following instruction: "(8) If you find the plaintiffs entitled to recover in this case, the measure of their recovery will be the difference between the fair market value of their premises immediately before the construction of the tile drain complained of in plaintiffs' petition, and the fair and reasonable market value of said premises immediately after the construction of the same. Upon such amount you will compute interest from October 8, 1909, at the rate of 6 per cent per annum, and said amount, with interest to this date, will be the amount of your verdict if you find for the plaintiffs." The ruling upon the objections to the testimony and the giving of the instruction were excepted to, and this constitutes the second main point relied upon for appellant.

The trial court also gave this instruction with reference to the permanency of the drain: "(7) You will find that the drain or improvement referred to in the last paragraph was permanent if it was of such character when put in, it was intended to be and in fact was such a permanent structure as would, if not changed by the hand of man, continue and operate as a drain indefinitely and without known limit in the future; but if the same was of such a nature and so constructed that it would naturally at some time, by the action of the water or by infiltration, become clogged with dirt or rubbish, and thus become practically ineffective and require a material repair, taking up or rebuilding, then the same would not be a permanent improvement or structure." The thought of the entire instructions was that, if this drain was permanent in character, the rule of damages given in instruction 8 should apply, unless the claim was barred by the statute

of limitations (which latter proposition was covered by other instructions not necessary to be quoted). Appellant's counsel make the broad claim that, no matter whether the drain constructed by defendant be temporary or permanent in character, the rule of damages is not the difference in the value of the land; but it is either the difference in the rental value or the value of the crops destroyed or other direct damage caused by each particular flood. Upon no question in the law is there so much uncertainty as upon the measure of damages. In some cases we have intimated, if not held, that plaintiff has an election in such matters unless it be found that by reason of the permanency of the structure the statute of limitations has barred all action. See *Risher v. Acken Coal Co.*, 147 Iowa, 459; *Hollenbeck v. City of Marion*, 116 Iowa, 69. On the other hand, we have held that if the structure is not permanent, or if the nuisance may be readily abated by the hand of him who established it, the damages are not to be measured by the loss of value in the land. *McGill v. Pintsch Compressing Co.*, 140 Iowa, 429; *Ferguson v. Firmenich Co.*, 77 Iowa, 581; *Randolf v. Bloomfield*, 77 Iowa, 52; *Shirley v. Railroad*, 74 Iowa, 169; *Loughran v. City*, 72 Iowa, 382; *Vogt v. City of Grinnell*, 123 Iowa, 332. And in still other cases we have held that, if the nuisance is distinctly permanent, the measure of damages is the decrease in the value of the land. *Risher v. Acken Coal Co.*, 147 Iowa, 459; *Harvey v. R. R. Co.*, 129 Iowa, 465.

If, then the nuisance was a permanent one, plaintiffs had the right to elect as to the measure of damages which they would claim. What, then, is a permanent nuisance? Our most recent pronouncement upon this question is as follows:

The mere fact that the city sewers were of permanent construction did not render the nuisance occasioned by them permanent also, for the municipality had the right at any time to abate it. In this respect cases like the present one

differ from *Powers v. City of Council Bluffs*, 45 Iowa, 652, for there, as was observed in *Hunt v. Iowa, Central Ry.*, 86 Iowa, 15, 'the whole injury was regarded as having occurred at one time, and, that time having been more than five years prior to the commencement of the suit, it was held to be barred. The injury was of such a character as to be beyond the defendant's power to remedy. It would be compelled to go onto the lands of others to erect barriers to prevent the damage. In this case, as is shown by the evidence, the remedy is in the defendant's own hands by work done upon its own land.' Again, it was pointed out in *Bennett v. City of Marion*, 119 Iowa, 473; that the injury in the *Powers* case was beyond the city's power to repair. 'The remedy to be applied there, if any, was the construction of a wall on plaintiff's premises, where defendant had no right to go. Here the remedy could be applied on defendant's own premises, and there can be no doubt of its duty to abate the nuisance.' As was said in *Hollenbeck v. City of Marion*, 116 Iowa, 70: 'Modern scientific research has discovered means of disinfecting and deodorizing sewage so that it is practically innocuous. . . . While the system may be said to be permanent, it does not appear that the nuisance created thereby may not at any time be abated by the defendant or by the court.' See, also, *Pettit v. Town of Grand Junction*, 119 Iowa, 352, and *Costello v. Pomeroy*, 120 Iowa, 213, where it is said that the wrong considered in *Powers v. City of Council Bluffs*, *supra*, and other like cases, consisted, not in creating a nuisance where the party had no right to be, but in negligently making an improvement where the right to construct it existed, and also that the doctrine of those decisions ought not to be extended. The nuisance consists not in the construction of the sewers in an illegal manner, nor where the city had no right to place them, but in pouring the filth from them into this stream instead of destroying it by filtration through beds of sand, and the use of a septic tank, thereby rendering the sewage innocuous. Indeed, this is precisely what the city did when threatened with a suit. A temporary excavation for filtration was made immediately and an appropriate tank, adequate for the disposal of all the sewage, to be completed by the 1st of December following, contracted for, thereby

demonstrating that the nuisance was not permanent. A nuisance can not be permanent which can be abated without unreasonable expense by the party creating it. (*Vogt v. Grinnell, supra.*)

The original doctrine was thus stated in *Powers v. City of Council Bluffs*, 45 Iowa, 652.

After the ditch was constructed and the water of the creek first began to work upon plaintiff's land, its continuance was just as certain as that water would flow in the creek unless changes were made therein by human hands. Its continuance would just as certainly be an injury as that the floods of the creek would wash the soil and earth through which the ditch was dug. It follows that plaintiff's cause of action then accrued for all injury sustained, or that in the future would be suffered. The very cause of action for which this suit was brought then existed.

In *Costello's* case, cited in *Vogt v. Grinnell, supra*, which was a suit in equity to enjoin an alleged nuisance, it was held that the tile drain there involved was not such a permanent nuisance that plaintiff's action was barred. There was no showing in that case, however, as to when any damage resulted from the laying of the tile. But in *Kopecky v. Bemish*, 138 Iowa, 362, and *Sheker v. Machorec*, 139 Iowa, 1, we expressly held that the measure of damage was the difference in the value of the land before and after. The result of this examination of the cases indicates that no hard and fast rule has been adopted and that much depends upon how the question arises.

In *Harvey's* case, *supra*, we said with reference to such objections as were here interposed:

Upon the trial in the court below the plaintiff offered testimony as to the depreciation in the value of her land, but in most cases fixed the date for the comparison as that of the completion of a railway embankment, instead of the date of the flooding of the land. In one instance, however, the witness, one J. Buffnam had his testimony directed

to the date of the flood, and, while the examination was somewhat indefinite, it was sufficient, we think, to take the question to the jury. The testimony as to the value of the land at the time of the construction of the embankment, which was within a year or less before the alleged injury, was perhaps objectionable if the case was being tried as one for continuing damages; but no specific objection was made thereto as being too remote. Plaintiff was presenting her case evidently upon the theory that her damages were original, and, if defendant wished to raise the point that they were continuing, we think it should have made its position clear, and, failing to do so, it can not accomplish a successful ambushade under cover of a general objection that the evidence is 'incompetent, irrelevant, and immaterial, and not a correct measure of recovery.' In the absence of any demand by defendant that the damage be assessed as original rather than continuing, there was no error in the admission of the testimony offered which would justify us in holding that the case should not, in any event, have been submitted to the jury. *Hollenbeck v. Marion*, 116 Iowa, 70.

We are not now attempting to announce a rule for all cases. It is enough for the present to dispose of the one at hand and to say that on the entire record defendant is not entitled to complain, unless it be for another proposition relied upon by him to the effect that as the nuisance was abated after the commencement of the suit, but before trial, by the drainage proceedings, the damages should not have been assessed as if the nuisance were a permanent one. Hereto there is considerable confusion in the cases. In some of them it has apparently been held that one may have judgment for damages as for a permanent nuisance and an order for immediate abatement in the same suit. *Miller v. K. & D. R. R.*, 63 Iowa, 680; *Platt v. C. B. & Q. R. R.*, 74 Iowa, 127; *Downing v. Oskaloosa*, 86 Iowa, 352; *Harvey v. Railroad*, 129 Iowa, 465. This by reason of the provisions of section 4302 of the Code. But in *Steber v. Railroad*, 139 Iowa, 153, this question was mooted and left undecided.

We shall not now make any definite pronouncement upon the proposition, for the reason that the verdict of the jury clearly shows that nothing was allowed by way of damages for an indefinite future continuance of the nuisance. The verdict was for \$106.33, and the testimony tended to show a continuous flooding of at least twenty acres of plaintiffs' land for four years. Had the jury taken plaintiffs' testimony as a basis for its allowance of damages on the theory that the nuisance would always exist, it should have allowed something like \$2,000. The size of the verdict is a clear demonstration that the jury did not allow anything, by way of damages, for a permanent nuisance continued indefinitely into the future. With the alleged nuisance fully abated, the lands of both parties now rédeemed and a small verdict for damages done after the large tile was laid and before the nuisance was abated, it would seem that the parties should be content; but they are not, and in consequence we have not attempted to do more than to demonstrate that defendant has no cause for complaint. The jury evidently believed plaintiffs' witnesses, who testified, that the water from the pond never ran down and upon plaintiffs' land before the laying of the large tile, and that defendant should pay the damages done during the four years the water was cast upon plaintiffs land.

Finding no prejudicial error, the judgment must be, and it is, *Affirmed*.

EVANS, J., (dissenting in part). I am not ready to agree to the correctness of instruction No. 5 given by the trial court. Whether it was prejudicial I need not consider.

WILLIAM J. LAWLESS, Minor, by his Guardian and next Friend, MARY E. LAWLESS, Appellant, v. JAMES LAWLESS, et al.

Wills: PROBATE: EVIDENCE: DECLARATIONS OF DEVISEE. The declarations of one devisee against his interest are not admissible in a probate proceeding, if the effect would be to overthrow the will, which includes provisions in favor of other devisees.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

WEDNESDAY, APRIL 10, 1912.

IN a proceeding for the probate of the will of James Lawless, deceased, plaintiff, a minor, by his guardian and next friend, filed objections to the probate on various grounds. Objections were also filed by Michael Lawless. On issues properly raised the case proceeded to trial on the objections interposed by William J. Lawless, minor; Michael Lawless having withdrawn his objections filed. At the conclusion of the introduction of evidence in behalf of the plaintiff, the court, on motion, directed a verdict for the defendants, the proponents of the will, and a judgment was entered admitting the will to probate, from which judgment the plaintiff appeals.—*Affirmed.*

D. M. Vinsonhaler, Amos E. Henely, and Walter Stillman, for appellant.

A. L. Preston and John P. Organ, for appellees.

McCLAIN, C. J.—It was conceded on the trial that

the only ground of contest supported by evidence either received or offered was that of undue influence on the testator exercised by Nellie Lawless, a daughter, with whom testator resided, and who is one of the proponents. The evidence offered to sustain this ground of contest was testimony of witnesses by whom it was proposed to prove certain declarations of the daughter, Nellie Lawless, made after the execution of the instrument, indicating that she had exercised some influence over the testator with reference to the disposition of his property. This proffered testimony was rejected, on objections interposed for the proponent that proof of such declarations was not admissible, in view of the fact that in a contest as to probate of a will the declarations of one devisee tending to show undue influence are not admissible, if the instrument provides for devises to others having no joint interest with the devisee whose declarations it is proposed to prove.

To make clear the relations of the parties and their respective interests under the will in question, it should be stated that proponent James Lawless, a son of testator, was made executor of the will, and that to him was devised an eighty-acre tract of land; that to another son, Michael Lawless, was devised another eighty-acre tract of land, subject to the payment of \$1,200 to William Lawless (contestant), the only son of a deceased son of testator; and that to Nellie Lawless, a daughter of testator, with whom he resided at the time the will was executed, was devised a tract of one hundred and twenty acres of land, with residence property and testator's personal property. The will specifically recites that the sons and daughter named were the only living children of testator, and that William Lawless was the only grandchild representing a deceased child, and the reason assigned for making no other or different provision for William Lawless was that his father had received during his lifetime a fair proportion of testator's property.

This court has frequently announced its adherence to the rule, first definitely recognized in this state in the case *In re Estate of Ames*, 51 Iowa, 596, that, in a contest as to the validity of a will on grounds of unsoundness of mind or undue influence, declarations of one devisee, tending to show such unsoundness of mind or undue influence, are not admissible if there are other devisees, not joint with the declarant, whose interests would be prejudiced by the refusal to probate the will on grounds which such declarations tend to establish. Recent cases supporting this rule are *Hertrich v. Hertrich*, 114 Iowa, 643; *Fothergill v. Fothergill*, 129 Iowa, 93; *Vannest v. Murphy*, 135 Iowa, 123; *Casad v. Ripley*, 145 Iowa, 544; *James v. Fairall*, 154 Iowa, 253.

Counsel for appellant cite the case of *Lundy v. Lundy*, 118 Iowa, 445, as in some way qualifying this rule; but that case seems to be based upon a well-recognized exception, that declarations of the sole devisee tending to show want of mental capacity or undue influence are admissible as declarations against interest. See *James v. Fairall*, *supra*. The subsequent cases already cited indicate no other exception, nor do they suggest any inclination on the part of the court to abandon the rule first announced in the *Ames* case. Many authorities from other states are cited, in our own cases above referred to, to indicate that the rule as we have adopted it is supported by the weight of authority. It would be superfluous to now cite or refer to the cases from other states to which our attention is called by counsel for appellee. They are collected in text-books on the subject. See 1 Underhill, Wills, Section 163; Page, Wills, section 424; 1 Greenleaf, Evidence, section 176; 2 Wigmore, Evidence, section 1081. By these authors the weight of authority is announced as supporting the rule adopted in the *Ames* case.

It is difficult to see how, in cases similar to that now before us, the will could be treated as consisting of several

parts, and the devise to the beneficiary whose declarations tend to impeach it on the ground of undue influence or want of mental capacity annulled, and the other portions making devises to other beneficiaries sustained; and it is clear that the devises to beneficiaries not bound by the declarations of the beneficiary making them should not be affected by such declarations, which, as to them, are purely hearsay evidence. The will must be treated as one instrument, and must be found on competent evidence not to be the will of the testator in order to justify the court in rejecting it. We must adhere to the rule often announced, and hold that the testimony tending to show declarations of one devisee against his interest are not admissible, if the effect of admitting such declarations would be to overthrow a will which includes provisions in favor of other devisees.

The judgment is therefore *Affirmed*.

GUS DAHLSTROM, Appellant, v. Unknown Claimants and
M. ABLIETER.

Mortgages: CONCURRENT LIENS: EFFECT OF ASSIGNMENT. Separate
1 mortgages simultaneously executed, between the same parties and covering the same property are not necessarily to be regarded as a single instrument, but each as a distinct contract complete in itself; and when simultaneously filed they create concurrent liens, and in the absence of an agreement the assignment of one will not give it priority over the other.

Same: FORECLOSURE OF ONE CONCURRENT MORTGAGE: EFFECT. The
2 foreclosure by the mortgagee of one of two concurrent mortgages covering the same property, after an unrecorded assignment of the other, will not discharge the assigned mortgage; the assignee not having been made a party to the foreclosure and there having been no reference to the assigned mortgage in the foreclosure proceedings.

Appeal from Mitchell District Court.—HON. C. H. KELLY,
Judge.

WEDNESDAY, APRIL 10, 1912.

ACTION was begun to quiet title against unknown owners. M. Ablieter answered by pleading that he held a mortgage by assignment on the land, and prayed that it be established as a lien thereon. The petition was dismissed, and plaintiff appeals.—*Affirmed.*

F. T. Van Liew and Stoughton & Brown, for appellant.

Springer, Clary & Condon, R. Feyerabend, and Geo. E. Marsh, for appellees.

LADD, J.—One Woodward, who owned the two hundred and thirty-four acres of land in controversy, executed two mortgages thereon to Shaffer Bros. on the same day, one to secure the payment of two notes of \$1,000 each, dated January 15, 1907, payable five years after date, and the other to secure the payment of a note of \$6,000 dated January 15, 1907, and payable five years after date. These mortgages were filed for record at the same time. On the same day, Woodward executed a deed of conveyance, subject to these mortgages, to the International Land Company. The plaintiff recovered judgment against this company for \$2,400 and costs June 1, 1908, having previously caused the land to be attached; a special execution issued, and the land in controversy was sold thereunder, and the sheriff's deed executed to plaintiff December 14, 1909. Shaffer Bros. instituted foreclosure proceedings on the \$2,000 mortgage, and decree of foreclosure was entered October 14, 1908. Special execution issued, and the land covered thereby was sold by the sheriff December 2d following. The certificate of sale was issued to Shaffer Bros.,

and by them assigned to plaintiff, to whom the sheriff's deed was executed December 13, 1909. The \$6,000 mortgage was not referred to in the proceedings. It, with the note for that amount, had been assigned in writing to M. Ablieter of Boscobel, Wis., October 11, 1907. The assignment, though acknowledged by Shaffer Bros., was never recorded. This action to quiet title against unknown claimants was begun September 9, 1910. M. Ablieter filed an answer in October following, in which he set up the execution of the \$6,000 note and mortgage, the assignment to him for value, and prayed that the said mortgage be established as a lien against the land, and that as to him the petition be dismissed. The contention of the plaintiff is that the transaction as recited had the effect of divesting the \$6,000 mortgage, and that he is entitled to the land with the lien thereof discharged. On the other hand, the defendant says that, inasmuch as this mortgage had been assigned to him long before plaintiff acquired any interest in the land and prior to the foreclosure of the \$2,000 mortgage, it was not released or discharged by the foreclosure thereof and the redemption by plaintiff effected by taking an assignment of the sheriff's certificate of sale, and that, in any event, such foreclosure proceedings were void because of a defect in the proceedings.

As both mortgages were executed by the same mortgagor to the same mortgagee on the same day, this may have been done as part of the same transaction, but from this circumstance alone it is not to be inferred that the notes were given as evidencing portions of the same indebtedness, nor that the mortgages are to be treated as parts of a single instrument. Each mortgage is complete in itself, and is to be regarded as a distinct contract. *McDonald v. Second National Bank*, 106 Iowa, 517.

The mortgages having been executed on the same day by and to the same parties and filed for record the same

1. MORTGAGES:
concurrent
liens: effect
of assignment.

instant were simultaneous and their liens concurrent, and as there was no agreement, express or to be implied, as to which should be superior, the assignment of the \$6,000 mortgage to Ablieter did not give it priority over the other. *Perry's Appeal*, 22 Pa. 43 (60 Am. Dec. 630); *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Greene v. Warnick*, 64 N. Y. 220; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316. Even when part of the notes secured by the same mortgage are assigned, priority of the security is not affected thereby; this being determined by the order of maturity of such notes. *Massie v. Sharpe*, 13 Iowa, 542; *Hinds v. Mooers*, 11 Iowa, 211; *Rankin v. Major*, 9 Iowa, 297. Such has always been the rule in this state, though there are authorities to the contrary elsewhere, and there is no sound reason for giving any greater effect to the transfer of one of two simultaneous mortgages. Both mortgages rank as equal liens without priority or preference to either, whether in the hands of the mortgagee or of another under an assignment, unless superior equities in favor of the one or the other is otherwise shown. 1 Jones, on Mtgs. sections 534-535, 607-a; *Riddle v. George*, 58 N. H. 25.

Had Shaffer Bros. retained the \$6,000 mortgage, it might have been necessary to have protected it as well as the owner of the premises in the foreclosure of the \$2,000 mortgage by either bidding enough for the land to satisfy both or by redeeming from the sheriff's sale on that foreclosure. *Wells v. Ordway*, 108 Iowa, 86. But they had assigned the larger mortgage to the defendant Ablieter long before foreclosure suit was begun. The latter might well have been made a party defendant. Wiltsie on Mtg. Foreclosure, section 184; *Potter v. Crandall*, 1 Clarke Ch. (N. Y.) 119. Had this been done, the relative rights of the respective lienholders in the security, whether or not sufficient to satisfy both, might have been determined. As

2. SAME: foreclosure of one concurrent mortgage: effect.

he was not a party, the extent of his lien has never been adjudicated. The mortgagor in executing the simultaneous mortgages must have done so with the knowledge that either might be assigned, and, after this has happened, there is no just ground for denying the assignee the security his separate mortgage was intended to afford on the ground that the holder of the other mortgage has foreclosed without making him a party. Had the mortgagor or his grantee or assignee thought it essential to the protection of his interest that he be made a party, he should have insisted thereon by motion or otherwise. In *Van Aken v. Gleason*, 34 Mich. 477, the simultaneous mortgages were to different persons, and, though one had been foreclosed by advertisement, the court held that a bill in equity was necessary to marshal assets. In *Barber v. Cary*, 11 Barb. (N. Y.) 549, one of two contemporaneous mortgages was foreclosed, and, as against the mortgagor, the court held the bid above the amount necessary to satisfy the judgment should be applied in satisfaction of the other mortgage. In *Scott v. Featherston*, 5 La. Ann. 306, it was said that the sale there considered "under the concurrent mortgage did not extinguish the other mortgage created in the same act and at the same time."

Had these mortgages been made to different mortgagees at the same time, and filed for record at the same instant, there could be no doubt but that the foreclosure of one without making the owner of the other, whether original mortgagee or the assignee, a party, would not have discharged the other. The situation is practically the same where the mortgagee to whom two contemporaneous mortgages have been executed assigns one of them, and there is no good reason for saying that the foreclosure of one of the simultaneous mortgages to different persons shall not satisfy the other mortgage, and that the foreclosure of one of two such mortgages executed to the same person shall work the discharge of the other when assigned

to another. 27 Cyc. 303. The courts of but one state so hold, and, as no reason is given therefor in any of the decisions, we are content in saying that we do not care to follow them. See *Magaw v. Garrett*, 25 Pa. 319; *Dungan v. American Life Ins. & Trust Co.*, 52 Pa. 253; *Bonstein v. Schweyer*, 212 Pa. 19 (61 Atl. 447). In *Moffitt v. Roche*, 76 Ind. 75, one mortgage was executed to secure the payment of promissory notes to several persons, and the court held that the foreclosure by the payee of one did not discharge the security as to others. And that court in *Murdock v. Ford*, 17 Ind. 52, applied the same rule where several installment notes maturing at different dates were secured by a single mortgage, declaring that such notes have priority in the order of maturity, and that the rights of one not made a party to whom a deferred note has been assigned are not affected by the foreclosure of an earlier note, and may redeem against the purchaser under such a decree. See, also, *Goodall v. Mopley*, 45 Ind. 355, and *Harris v. Harlan*, 14 Ind. 439. But the rule is otherwise in this state. In *Clayton v. Ellis*, 50 Iowa, 590, it was held that the assignee of a part of the mortgage debt can not redeem from a sale upon foreclosure, and in *Harms v. Palmer*, 61 Iowa, 483, where several installments matured by provision of the mortgage and some of them had been transferred, the assignee instituted foreclosure proceedings, and, upon decree being entered, caused all the land save the homestead to be sold thereunder, and; a supplemental decree subsequently being entered, the homestead also was sold. At this time a decree of foreclosure was entered on the installment notes retained by Palmer, the original payee. The latter undertook to redeem the homestead on the theory that he was a junior lien holder. The owner of the homestead having parted therewith, his wife also applied to redeem the homestead. The court held she was entitled to do so, and that Palmer had no right to redeem, saying that the

burdens of the mortgagor might not thus be increased by the transfer of a part of the notes secured saying that:

Were the rule such as insisted upon by defendant, a mortgagee, by splitting up his debt by assignment, could bid upon the land a sum less than its value, and the mortgagor could not redeem under the statute, without paying the whole of the mortgage debt. This would result in gross oppression and injustice to the mortgagor, and would operate so that his land would be sacrificed by a sale for less than its value. It can not be claimed, if a mortgage be given to more than one mortgagee, that they separately would have the right to redeem from the sale, or that the mortgagor in order to redeem must pay the whole debt. The case in no respect is different from that. Here there are in contemplation of law two mortgages the transfer of a part of the debt conferring upon one party the right of mortgagee. In enforcing their rights, so far as the mortgagor is concerned, they must be regarded as one. See same case, 73 Iowa, 446.

Plainly enough the decision is based on the theory that, as to the mortgagor, there was but one mortgage, and in fairness to him only one suit in foreclosure can be maintained thereon. In this action, however, there were two separate mortgages securing the payment of distinct debts, and on no tenable theory can the party executing these contend that foreclosing the one without the other involved the splitting up of causes of action or the oppression of the debtor. True, it may be necessary that the equities of the respective mortgages, because of being concurrent, finally must be adjusted, and this may embarrass him in the matter of redemption, but, having executed securities of this character, each distinct and assignable, and which when mature constitute separate causes of action, he is not in a situation to complain, and surely the plaintiff who acquired title as purchaser by virtue of sheriff's deed is in no better position. Either, if he so elects, may insist that the holder of the other mortgage

be made a party, and that such a decree be entered as shall protect the right of redemption. Not having done so, the assignee of the mortgage not foreclosed may insist upon his lien, though, as was held in *Van Aken v. Gleason*, 34 Mich. 477, a marshalling of assets may be necessary upon the enforcement of such lien by foreclosure. The defendant's note was not mature, and he was not bound to declare it due because of not having received interest thereon, and if so, then he was not required to join in the foreclosure proceedings had he known these had been commenced. Nothing was done by the assignee to mislead the plaintiff, nor was there any reference to the defendant's mortgage contained in the foreclosure proceedings. The owner of the land at that time doubtless might have compelled the Shaffer Bros. to have made the defendant a party to that action, but it did not do so, and this was known to plaintiff, as was the existence of the mortgage. He has title under two sheriff's deeds, one under execution sale on a judgment against the International Land Company and the other under foreclosure of the \$2,000 mortgage, and we are of the opinion that his equities, though probably equal, are not superior to those of the defendant. The decree so declaring has our approval.—*Affirmed.*

FRANK L. MCCOY and ROBERT H. OLMSTEAD, Appellants,
v. JAMES L. PAXTON and Others.

Waters: ACCRETIONS: DIVISION BY AGREEMENT. Accretion is the
1 gradual and imperceptible accumulation of land along the bank
of a stream or body of water; and where adjoining landowners
are each entitled to a portion of such accretions they may agree
to a division of the same irrespective of their exact legal rights.

Boundaries: ORAL AGREEMENTS: POSSESSION: STATUTE OF FRAUDS.
2 An oral agreement fixing a division line between adjoining owners
is not within the statute of frauds, where each takes possession

under the agreement with the knowledge of the other, regardless of the question of time; and such possession is sufficient if it clearly indicates an appropriation by the party who claims to own the property, without regard to personal occupancy, cultivation or improvement. In this action defendant's possession is held sufficient to uphold the oral agreement fixing the division line.

Same: ACQUIESCENCE. Acquiescence in a boundary line, with possession up to the same, for a period of ten years, is conclusive evidence of an agreement for its establishment.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

TUESDAY, MAY 7, 1912.

THE facts are stated in the opinion.—*Affirmed.*

McCoy & Olmsted, S. H. Cochran, and Geo. S. Wright and Jacob Sims, for appellants.

Tinley & Mitchell, for appellees.

SHERWIN, J.—This is an action to quiet title. The land in controversy is all accretion made by the action of the Missouri river, which bounds it on the west. It all lies south of a line running due west to the river from the southeast corner of section 17, and is between the river and section 16 and 21. The plaintiffs are the owners of section 17, and the defendants are the owners of those parts of sections 16 and 21 that fronted on the river. Section 17 is a fractional section, consisting of lots 1 and 2. According to the government survey of 1852, the left bank of the Missouri river is meandered as commencing approximately at what would be the northwest corner of the N. E. $\frac{1}{4}$ of section 17, running thence diagonally in a southeasterly course, striking the easterly line of section 17 a short distance below what would be the southeast

corner of the N. E. $\frac{1}{4}$ of section 17, and continuing thence in a southeasterly direction. Lot 1, in section 16, is the tract of land that would have been, had the section been a full one, the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$; and lot 2 of section 16 would have been the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 16. The meandered line of the left bank of the river continued diagonally to the southeast, cutting off the southwest corner of lot 1 in 16, leaving it with about thirty acres. Since the government survey in 1852, the Missouri river has gradually established itself about a mile west, and in doing so formed the land in controversy. The plaintiffs claim that all of the land in controversy is accretion to section 17, and, because thereof, that they own it all. The defendants claim, on the other hand, that the land is accretion to section 16, and, as special defenses, that the boundary was orally agreed upon and has been acquiesced in for more than ten years. Lot 2, in section 17, is the south tract in that section; and the south part of the east line thereof forms the west line of the northerly part of lot 1, in section 16. So it will be seen that lot 1 in 16 extends south of the extreme south end of lot 2 in 17. Lot 2 in 16 is south of lot 1 in that section.

John Hanthorn became the owner of lot 2 and a part of lot 1 in section 17 in June, 1866, and he owned this land until October 14, 1887, when he sold it to James F. Lyons. Mrs. Eliza J. Hough became the owner of lot 1 in section 16, June 21, 1866; and she retained ownership thereof until July 12, 1892, when she sold it to M. M. Marshall. Thus, from the 29th day of June, 1866, until October 14, 1887, John Hanthorn was the owner of lot 2, in section 17, and Mrs. Hough was the owner of lot 1 in section 16. James F. Lyons conveyed the land in section 17 to Edwin H. Walker and Marshall C. Hamilton in July, 1890 and in September, 1891, Edwin H. Walker conveyed to his minor son, Thomas H. Walker, his undivided one-half interest therein. In April, 1894, Hamil-

ton conveyed his interest in section 17 to J. B. Young; and in August, 1894, Young conveyed the same interest to Thomas H. Walker, who thus became the owner of all the land in section 17. In May, 1901, he conveyed to plaintiffs. The title to lot 1, in section 16, came to the defendants through conveyances from Mrs. Hough down. A part, if not all, of the land in controversy, and much more of the same kind north of it, had been formed when Hanthorn and Mrs. Hough became the owners of their respective lots in sections 17 and 16. Their lands were at that time heavily timbered; and as early, at least, as 1867, there was young timber on the land in controversy for some distance west of the meandered line of their lands.

In the fall of 1874, John Hanthorn and a son of Mrs. Hough located the southeast corner of section 17, and blazed a line from there due west as far as there was growing timber, which was six or seven hundred yards; and Hanthorn, at that time, stated that the line thus marked was the division line of the accretions to sections 17 and 16. In December, 1883, one Wallace Walker was cutting timber south of the line that had been marked by Hanthorn and young Hough in 1874, and Hough ordered him to stop. A few days later, Hanthorn and Hough agreed to have the line located by a surveyor, which was accordingly done; and it was found to be where they had themselves located it in 1874. The line was re-marked on trees, and corner stones were placed at both ends thereof. The line thus marked was open and visible when, in 1892, or 1893, a fence was placed there, which has since marked the division line. James F. Lyons, who was then the owner of the west half of lot 1 in 17, was present a part of the time while the survey of 1883 was being made. In 1887 the treasurer of Pottawattamie county sold the accretion land south of this line for the taxes of 1885-86, to James F. Lyons for the sum of \$20.72; the tax certificate

describing the land as four forty-acre tracts in the S. E. $\frac{1}{4}$ of section 17—76—44. There was no such government description, however; and it is evident that Lyons was then attempting to acquire the title to the accretion land south of the Hanthorn-Hough line under the tax sale. When Marshall C. Hamilton and Edwin H. Walker bought lots 1 and 2 in 17 of Lyons in July, 1890, Hamilton understood that lot 2 and accretions did not extend further south than the line in question. And when Hamilton sold his undivided one-half interest in the land in 17 to J. B. Young in April, 1894, Hamilton advised Young that the south line of the accretion land was the fence in question. Young was not fully satisfied with Hamilton's statement; and, to determine certainly what claims were made to the accretion land by the occupants south of said line, Young went to Marshall, who had bought of Mrs. Hough and was then in possession, and talked the matter over with Marshall, who then told him that the fence marked the line that had been agreed upon years before; and that he made no claim to any of the accretion land north of it. The record shows, further, that when Lyons conveyed to Hamilton and Walker lots 1 and 2 in section 17, in July, 1890, he also assigned to them the tax certificate, covering the accretion land south of this line; and that after Hamilton had conveyed his interest in lots 1 and 2 to Young he still claimed to own an interest in the accretion land south of the fence, under the tax sale.

There is a great mass of evidence touching the question whether the land in controversy is accretion to both sections 17 and 16, or only accretion to section 17, as claimed by the appellants. The lapse of time has made it almost impossible to determine, with any degree of certainty, just how this land was formed, or to determine whether it is, in fact, all accretion to section 17, or

1. WATERS:
accretions:
division by
agreement.

accretion to section 16 as well. We have given the record a great deal of study, and we must confess that we are still in doubt as to the truth of the matter. The changes in the river were apparently great at the point in question before the government survey of 1852; and after that survey, and up until the cut-off of 1873, its vagaries are marked. The evidence of men who were fairly familiar with the river thirty or thirty-five years before this case was tried below is, in our judgment, of but little value in determining whether the land in question was gradually formed in such way as to become, in fact, accretion to both sections, or to only section 17. The landmarks left by the shifting channel may be fairly well defined; but accretion is the gradual and imperceptible accumulation of land, and it is, at best, in most instances a difficult matter to determine the precise point at which the increase started, or the exact course that it followed.

We shall not attempt to determine this branch of the case, for the reason that we are of the opinion that a division line was agreed upon as early as 1874, and reaffirmed in 1883, and because the parties in interest acquiesced in the present line for a period of more than ten years. And, in this connection, we should say that the appellees do not rely upon title by adverse possession, so that question is not before us. There is no question but what the land lying west of the meander line of sections 16 and 17 was accretion; and if a part thereof was believed to be properly accretion to section 16 the owners of the land in place to which the accretion belonged could undoubtedly establish the line between their accreted interests by agreement, or by acquiescence. The situation is, of course, a little different from that where a line between two surveyed tracts is in dispute, but the law of accretion gives to each riparian owner a part, at least, of the whole body accumulated by his own and the adjoining land; and where there is such an increase it is entirely competent

for the adjoining owners to agree how the accreted land shall be divided, and this is true regardless of the exact legal right that either may have therein.

An oral agreement, whereby a division line is established, is not within the statute of frauds, where the parties enter into possession, with the express or implied consent

2. BOUNDARIES:
oral agree-
ments: posses-
sion: statute
of frauds.

of each, and retain the same. Code, section 4626; *Kitchen v. Chantland*, 130 Iowa, 623; *Hays v. Marsh*, 123 Iowa, 84. A sale of real estate in parol, accompanied with possession is valid. *Chamberlin v. Robertson*, 31 Iowa, 408; *Tuttle v. Becker*, 47 Iowa, 486. And if such be the rule, it must follow that an oral agreement, fixing a division line, where possession is taken under the contract with the knowledge of the other party, is valid and final, regardless of the question of time. See, also, *Kitchen v. Chantland*, *supra*. There was a question between Hanthorn and Mrs. Hough as to their respective rights in this accreted land, and they selected their own way of determining such rights. And, after the lapse of more than thirty-five years, the courts should not indulge in technical refinements, which will result in setting aside this solemn agreement and in destroying property rights acquired thereunder.

It is true that neither of these parties made valuable improvements on any of this land; and it is also true that their possession thereof was not such as would ordinarily follow where the land was under cultivation. But they were both in possession, to some extent nevertheless; and we think such possession was sufficient for the purposes of this case. A person may be in possession of land without a personal representative thereon, or without having personally cultivated or improved it. *Barstow v. Newman*, 34 Cal. 90. Possession of land may be acquired and held in different ways; and the possession is sufficient if it is such as to clearly indicate an appropriation by

the person who claims to hold the property. *Trayers v. McElvain*, 181 Ill. 382 (55 N. E. 135).

The primary purpose of possession is to notify the community or neighborhood that it is in the exclusive use and enjoyment of the person so appropriating the land. Here there was no question made as to possession or the right of possession until after the plaintiff's purchase in 1901; and at that time and for years before the land was cultivated. So far, then, as possession may be necessary to perfect an oral agreement establishing a division line, every element thereof was present in this case when plaintiffs became the owners of section 17 in 1901.

Moreover, plaintiffs' grantors had actual knowledge of the agreement respecting the division line, and recognized the rights of Mrs. Hough and her grantees thereunder.

3. **SAME:**
acquiescence. Had there been no specific agreement, the evidence shows acquiescence in the line, accompanied by possession for a period of more than ten years; and this alone would be conclusive evidence of an agreement, and would bind the parties. *Miller v. Mills County*, 111 Iowa, 654; *Klinker v. Schmidt*, 114 Iowa, 695; *Kitchen v. Chantland*, *supra*. We think the learned district court rightly decided this case, and the judgment is *Affirmed*.

MAMIE CLARK, v. IOWA STATE TRAVELING MEN'S ASSOCIATION, Appellant.

Mutual insurance: ASSESSMENTS: BY-LAWS: CONSTRUCTION. A member of a purely mutual insurance association can not be assessed for losses occurring prior to his membership, unless he has agreed to pay such assessments. The by-laws in the instant case do not authorize such assessments; but if ambiguous in that respect they must be construed strictly against the association to avoid forfeiture.

Same: DIVERSION OF FUNDS. A mutual insurance company has no

2 power to create an emergency fund from dues and assessments paid by its members for another purpose, unless its charter and by-laws so provide; and such a fund not so provided for is illegally created.

Same: DIVERSION OF FUNDS: ESTOPPEL. The fact that a member
3 of a mutual insurance association received a copy of a resolution in the form of a recommendation for the creation of an emergency fund from funds paid for other purposes, and made no protest against the proposition, would not prevent his beneficiary from contesting the validity of the fund; in the absence of evidence that he knew of the existence of the fund or that his payments had been diverted thereto.

Same. An insurance association has no right to divert the pay-
4 ments made by a member to another fund illegally created, or to transfer thereto money from the general fund to which he has contributed; nor can he be compelled to contribute to a fund already in excess of that authorized.

Same: ASSESSMENTS: FORFEITURE. Where a mutual association has
5 demanded and received larger assessments than it was entitled to, the excess is held as a credit for future assessments; and where such credit exists the membership can not be forfeited.

Same: ACCIDENT INSURANCE: CAUSE OF DEATH: EVIDENCE. In this
6 action upon an accident certificate the evidence is held to show that the member was drowned, and to authorize recovery under a provision creating liability for bodily injuries through external, violent and accidental means, which independent of other causes resulted in death.

Same: BURDEN OF PROOF. The burden in this action was upon plain-
7 tiff to show that death resulted from a cause within the terms of the certificate; and this burden was met by a showing that the member was drowned while bathing, and is not overcome by the mere fact that he voluntarily entered the water.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

TUESDAY, MAY 7, 1912.

THE facts are stated in the opinion.—*Affirmed.*

Sullivan & Sullivan, for appellant.

Guthrie, Gamble & Street, and Bowen & Albertson,
for appellee.

SHERWIN, J.—The plaintiff is the widow and beneficiary of Hay Clark, who died on the 6th day of September, 1908, the holder of a benefit certificate issued by the defendant association on the 2d day of February, 1895. The defense is that Clark was not a member at the time of his death, because of the fact that he had not paid assessment No. 75, ordered by the board of directors on the 6th day of June, 1908, and which was payable, in any event, before the 1st day of August, 1908. It is conceded that this assessment of \$2 was not paid; but appellee contends that Clark was nevertheless a member in good standing at the time of his death, because of the several reasons which we shall later discuss.

The defendant is a purely mutual association under the statute and its charter and by-laws. Its articles of incorporation provide that its business "shall be the collection of funds from its members by fixed membership fees, dues and equal assessments upon each member, to be used for the mutual benefit and protection of its members, their families, heirs and beneficiaries." And further: "The directors shall have full charge of all funds of the association and shall have authority to make such assessments as may be necessary to carry out the aims and objects of this association." Article 5, section 4, of the by-laws, provides as follows: "The board of directors may order an assessment of not to exceed the sum of two dollars at any one time upon each member for the purpose of raising funds when necessary in the course of the business of the association and for the purpose of carrying out its aims and objects. The amount in the treasury of the association shall not be reduced below the sum of five thousand five hundred dollars, unless it is to pay benefits or indemnities prior to making and collecting the assessments therefor, and

whenever, by such payment, the funds therein are reduced below said sum, said directors shall then make an assessment as herein provided." And section 5 of article 5 provides that, "upon the death of a member in good standing, the board of directors may make an assessment on each member in good standing in the sum of two dollars (\$2.00), of which assessment the secretary shall forthwith notify each member." It will be noticed that under this section an assessment for a death benefit can only be made after the death has occurred.

At the annual meeting of the association in December, 1897, the following resolution was duly adopted: "Resolved, that it is the sense of this annual meeting that the present is a very favorable time to commence the accumulation of an emergency fund of \$100,000 to be made up (as fast as convenient) out of the annual dues, as they may be paid from year to year. This fund should be put out upon interest, but at all times subject to the acts of the president and board of directors, when, in their judgment, an emergency has arisen or when disturbing it will avoid the necessity of making more than four assessments in any year." And following its adoption the annual dues of the members were diverted to the emergency fund so provided for, and at the time of Clark's death there was \$169,000 in said fund. The association had long followed the rule of making but four assessments of \$2 each per year, and had on several occasions drawn from the emergency fund to meet its liabilities; and at one time it transferred from the general fund to the emergency fund \$15,000. At the time Clark became a member, there were liabilities on benefit certificates, aggregating over \$34,000, which were afterwards paid from funds to which Clark contributed by paying assessments leveled therefor. Appellee contends that Clark was not in default for failure to pay the last assessment, because he had before that time overpaid all valid demands, and was entitled to credit on the last assessment for such

overpayment. It is claimed that he had overpaid "by contributing to the payment of losses incurred before his membership, and for which he was not liable," "by contributing to a wholly illegal emergency fund," "by contributing to an excess in the emergency fund, even if it was valid to the amount contemplated by its terms," and "because moneys which he had contributed on assessments were diverted into the emergency fund without authority to use any funds received by assessments on that account, even if the emergency fund itself was valid." Appellee further says that the assessment was unnecessary, because there were available funds on hand in excess of any ascertained requirements, and that Clark was not bound to pay it. There are two or three sufficient reasons for holding that there was no loss of membership because of the non-payment of the last assessment.

In a purely mutual association, such as this is, a member can not be assessed for, or be compelled to pay, losses that occurred prior to his membership, unless he has agreed to do so; and there is nothing in the record before us which suggests that Clark contracted to become thus liable. *Hetzel v. Golden Precept*, 129 Iowa, 655; *Newman v. Association*, 76 Iowa, 56; *Collins v. Insurance Co.*, 96 Iowa, 216.

The provision in section 4 of article 5 of the by-laws does not, in our judgment, necessarily indicate that the board may assess new members for past losses. The declared mutual purpose of the association would negative such intent; and, if there is ambiguity in the by-law in question, it must be construed strictly against the association, to prevent a forfeiture.

We shall not determine whether an emergency fund may be legally provided by a mutual association of this kind. For, however that may be, it is very clear that the defendant's action, in attempting to provide for such fund

1. MUTUAL
INSURANCE:
assessments:
by-laws:
construction.

was illegal. The constitution and by-laws provided what funds should be raised, and how the dues and assessments should be used; and if, under the statute, the association had the power to provide an emergency fund, it could only be done by amendment to the charter or by-laws, adopted in the manner pointed out therein. An amendment to the constitution requires "two-thirds vote of the members in good standing present" after the proposal has been on file with the secretary "ninety days prior to the meeting." The requirement for amending the by-laws is as follows: "These by-laws may be revised or amended at any regular meeting of the association by two-thirds vote of the members present: Provided, that any proposed revision or amendment thereto be filed in writing with the board of directors not less than thirty days prior to said meeting, such proposed amendment to be mailed immediately thereafter to each member in good standing." There was no pretense of complying with either of these provisions of the constitution and by-laws; and nothing further than the adoption of the resolution was ever done to authorize the creation of the emergency fund.

Appellant, says, however, that Clark acquiesced in the action of the association relative to the fund, because he had notice of the adoption of the resolution and made no protest. But this is begging the question on the record in this case. Clark may have received a copy of the resolution and notice of its adoption, as claimed by appellant; but there is absolutely no evidence tending to show that he had knowledge of the existence of the fund, or that the annual dues paid by him had been diverted thereto. He was charged with notice of the provisions of the charter and by-laws, and knew that such fund could not be legally created without amendment thereto. The resolution was in the form of a recommendation merely; and Clark had the right to assume

2. SAME:
diversion
of funds.

3. SAME:
diversion
of funds:
estoppel.

that no further action relative thereto would be taken without proper amendment to the by-laws. True he paid his dues and assessments thereafter; but he is not shown to have had knowledge that any of the money so paid was being placed in this fund. On the contrary, he had the right to believe that his payments were being applied in strict accordance with the laws of the state and the association. There can be no acquiescence without full knowledge; nor will the doctrine be applied in aid of a forfeiture where an illegal exaction has been made.

The emergency fund having been illegally created, the association had no right to divert any of Clark's payment's thereto, either in the annual dues paid by him, or

4. SAME. by transferring to such fund the \$15,000 from the general fund to which Clark had contributed. Furthermore, had the emergency fund of \$100,000 been legally created, the defendant would have had no right to use Clark's money to help swell the fund to \$169,000. His money could only be legally used for the purposes designated by the laws of the association. He was not bound to contribute to a fund in excess of that authorized; and the use of his money for such purpose would have been illegal in any event.

Where an association of this kind has exacted and received from a member more money than it was entitled to, it is held as a credit to be applied on future assessments; and, where such credit exists, the

5. SAME: assessments: forfeiture. membership can not be forfeited for a failure to pay an assessment. *Younghoe v.*

Association, 126 Iowa, 374; *Hetzel v. Knights, etc., supra*; *Trotter v. Grand Lodge*, 132 Iowa, 513; *Rambousek v. Toilers*, 133 Iowa, 375; *Wait v. Workers*, 140 Iowa, 648. For the reasons above stated, there could be no forfeiture of Clark's membership, and we need not discuss other points relied upon by the appellee. We hold

that he was a member in good standing at the time of his death.

The appellant's by-laws provide that, "whenever a member, in good standing, through external, violent and accidental means, receives bodily injuries which shall, inde-

6. SAME:
accident insur-
ance: cause
of death:
evidence.

pendently of all other causes, result in death," it shall be liable, and that no liability shall exist where death results, wholly or partially, directly or indirectly, from disease, bodily or mental infirmity, or from intoxication. The facts surrounding the death of Clark were as follows: On the Sunday of his death, Mr. Clark was in Kansas City, Mo., with his son, who was then about fifteen years of age. They had breakfast after nine o'clock in the morning, and dinner at a little after one o'clock. Soon after dinner, the two went to the Elks' lodgeroom, and a few minutes after reaching there they both went to the pool for a bath. Clark had been in the water a few minutes, and was walking towards his son, when he made a slight jump forward, made a few faint motions with his hands, and sank. He was taken from the pool five or ten minutes later, dead. An autopsy showed him to have been in perfect health in life, and the opinion of several medical experts was that the cold water had produced a shock from which Clark's system did not react; that his vitality was thereby reduced and a fainting spell brought on, which caused him to sink; and that he was drowned. While the appellant earnestly insists that the evidence is sufficient to sustain a finding that Clark was drowned, we think otherwise. The testimony of the physicians, based largely on the autopsy, it is true, together with the testimony of the eyewitnesses, was ample to take the case to the jury on that question. *Hopkinson v. Knapp & Spaulding Co.*, 92 Iowa, 328; *Railway Co. v. Wood*, 66 Kan. 613 (72 Pac. 215); *Bradbury v. City*, 80 Conn.

298 (68 Atl. 321); *Dunlap v. Rock Island*, 145 Mo. App. 215 (129 S. W. 262).

The burden rested on the plaintiff to prove that Clark's death was the result of accidental means, and appellant contends that this burden has not been met; and, further, that the cause of death established was not within the terms of the policy, because it was not shown to be independently of all other causes, and because it was a death resulting, wholly or partially, directly or indirectly, from "disease, bodily or mental infirmity." These contentions may be discussed together. We do not understand that the appellant is claiming that drowning may not, under certain circumstances, be accidental; and as we have already said, the evidence is sufficient to sustain the finding that he was, in fact, drowned. If we get the right idea of appellant's claim at this point, it is that Clark's voluntary act in entering the water was one of the causes of his death, or a contributing cause thereof. The position is unsound. Followed to its final result, it would mean that no man can recover on an accident policy containing a similar provision, if he received an injury while voluntarily engaged in any physical movement. Such a construction of the appellant's law would cause alarm among its 31,000 members, and surprise even the makers of the law, if the provision was ever intended to furnish indemnity for the money paid to the association. *Mutual Co. v. Barry*, 131 U. S. 100 (9 Sup. Ct. 755, 33 L. Ed. 60); *Insurance Co. v. Schmitz*, 66 Ark. 588 (53 S. W. 49, 74 Am. St. Rep. 112); *Southard v. Insurance Co.*, 34 Conn. 574 (Fed. Cas. No. 13,182); *Association v. Alexander*, 104 Ga. 709 (30 S. E. 939, 42 L. R. A. 188); *Insurance Co. v. Hubbell*, 56 Ohio St. 516 (47 N. E. 544, 40 L. R. A. 453). *Carnes v. Association*, 106 Iowa, 281 (76 N. W. 683, 68 Am. St. Rep. 306), furnishes no support for appellant's contention. There the deceased voluntarily took a rank poison. The facts

distinguish this case from the *Feder* case, 107 Iowa, 538. The clause in question undoubtedly means that an accident must be the immediate and final producing cause of death. Analogous to this is the provision relative to "disease, bodily and mental infirmity." This can only apply where the disease is a co-operating ultimate cause of the injury. In this case, there is no evidence of disease or infirmity, other than the shock produced by the water and the fainting spell, and it falls squarely within the rule announced in *Meyer v. Fidelity & Casualty Company*, 96 Iowa, 378, and is not within the rule in *Binder v. Association*, 127 Iowa, 25, and other like cases.

Complaint is made of two instructions given and of the refusal to submit some of the appellant's requests. We think there is no just cause for complaint. The sixth instruction was in line with the *Meyer* case; and the instruction relative to intoxication was not prejudicial to the appellant. So far as the requests were pertinent, they were embodied in the instructions given. The judgment should be, and it is, *Affirmed*.

HENRY L. WHITE, Appellant, v. INTERNATIONAL TEXT BOOK Co., and O. O. CRANE, Appellees.

Appeal: LAW OF THE CASE. A determination by the appellate court
1 on a former appeal that the evidence was sufficient to take the case to the jury on all the issues raised became the law of the case, whether right or wrong.

Malicious prosecution: PROBABLE CAUSE: EFFECT OF SETTLEMENT. As
2 a general rule the settlement or attempted settlement of a debt with an accused does not of itself show that a criminal prosecution was instituted without probable cause; and it is also generally true that a dismissal of criminal proceedings brought about by the accused, or by reason of a settlement, is not such a termination of the proceedings as will justify an action by the defendant therein for malicious prosecution; but an agreement not to prosecute upon payment of a debt is *prima facie* evidence

of want of probable cause, which, in the absence of evidence to the contrary becomes conclusive.

Same. Ordinarily an action for malicious prosecution will not lie
3 for the prosecution of a civil suit; but if there has been a seizure of goods or an arrest of the defendant therein it will lie.

Same: ESSENTIAL ELEMENTS. To sustain an action for malicious
4 prosecution the previous prosecution must be shown, its instigation by the defendant, its termination by acquittal or discharge of plaintiff, want of probable cause and malice. There must be a complete termination of the original prosecution, but this may be shown by an acquittal, discharge after preliminary examination, or by a dismissal of the prosecution.

Same: RIGHT OF RECOVERY: EFFECT OF CONVICTION. Conviction of
5 an accused upon false testimony and without foundation in law will not defeat an action for malicious prosecution: Nor will an acquittal entitle him to recover if it is shown that he was in fact guilty of the original charge against him.

Same: PROBABLE CAUSE. Probable cause is a defense to any action
6 for malicious prosecution; so that settlement of an action for malicious prosecution of a civil suit by payment of money, either upon defendant's procurement or by a settlement understandingly made and without duress, is a distinct admission that something was due and constitutes a defense to the action for malicious prosecution.

Same: MALICE. If one uses the criminal law for some collateral
7 or private purpose, rather than to vindicate the law itself, or knowing that only a civil wrong has been committed, he will be deemed to have acted maliciously.

Same: TERMINATION OF PROSECUTION. The dismissal of a prosecution
8 with the taxation of costs against the county is a sufficient termination of the proceeding to authorize an action for malicious prosecution.

Same: SETTLEMENT OF PROSECUTION: DURESS: EVIDENCE. The settlement
9 of a prosecution by one charged with a crime must have been voluntary on his part to prevent his suing for malicious prosecution. In this action the evidence is held to show that settlement of the prosecution was induced by duress and that the proceeding was instituted to compel payment of a civil debt.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

TUESDAY, MAY 7, 1912.

ACTION for malicious prosecution. At the conclusion of plaintiff's testimony, the trial court, upon defendants' motion directed a verdict for the defendants. Plaintiff appeals.—*Reversed.*

John N. Hughes, and C. R. Sutherland, for appellant.

F. L. Anderson and C. D. Harrington, for appellees.

DEEMER, J.—This is the third appearance of the case before this court. Opinions on the other appeals will be found in 144 Iowa, 98, and 150 Iowa, 27. In these two opinions it was held there was enough testimony to take the case to the jury upon every issue tendered on the last trial in the district court save one, and that was a plea to the effect that the criminal proceeding was settled and dismissed at plaintiff's instance and request, and that, having been so disposed of, the action was not determined in such a manner as to entitle plaintiff to sue for malicious prosecution. That question was argued on the second appeal, but we did not decide it, because no such issue was made by the pleadings as they then stood. To the issue thus tendered on the last trial plaintiff filed a reply in which he denied the alleged settlement, and further pleaded that the money which he paid to defendant or its agent was obtained from him by duress, that the payment was involuntary and against his will and, because of his then imprisonment, that the payment was under protest and with knowledge on the part of the defendant Text-Book Company that he did not owe it anything. After hearing plaintiff's testimony, the trial court thought the showing conclusive against a right to recover, and it refused to submit the issue of the nature of the payment to the jury.

If the verdict was directed upon any other ground,

then the order was erroneous because on former appeals we held that, under the issues as then presented, there

1. **APPEAL: law of the case.** Was enough testimony to take the case to the jury on each and every proposition.

This made the law for the case; and, whether correct or not, it was the duty of the trial court to observe and follow our previous decisions. This is too fundamental to require the citation of authorities in its support, but see *Hensley v. Davidson Bros.*, 135 Iowa, 106; *Russ v. Am. Cereal Co.*, 121 Iowa, 639, and cases cited.

The sole question which we may consider upon this appeal is the effect to be given the testimony as to the payment made by the plaintiff while he was under arrest and

2. **MALICIOUS PROSECUTION: probable cause: effect of settlement.** in jail. It is true, of course, as a general rule, that a settlement or attempted settlement of a debt with the accused does not of itself show that the proceedings were insti-

tuted without probable cause, and it is also true, as a general rule, that a dismissal of the proceedings by procurement of the accused, or by reason of a settlement between the parties, is not a sufficient termination of the proceedings to justify an action by the defendant therein for malicious prosecution. *Holliday v. Holliday*, 123 Cal. 26 (55 Pac. 703); *Emery v. Ginnan*, 24 Ill. App. 65. But it is also true that, if one arrests another on a criminal charge for the purpose of compelling the payment of an indebtedness, an agreement not to prosecute further upon payment of the debt is *prima facie* evidence of want of probable cause and conclusive in the absence of satisfactory evidence to the contrary. *Prough v. Entriken*, 11 Pa. 81. Now, while there is an apparent conflict in the case as to the effect of a settlement and dismissal of a criminal action upon an action for malicious prosecution, the great weight of authority seems to favor the proposition that where a criminal proceeding is dismissed or abandoned by procurement of the party prosecuted, by settlement or com-

promise with the prosecutor, it is not such a final determination of the matter in his favor as will support an action for malicious prosecution. *Brown v. Randall*, 36 Conn. 56 (4 Am. Rep. 35); *Craig v. Ginn*, 3 Pennewill (Del.) 117 (48 Atl. 192, 94 Am. St. Rep. 77, 53 L. R. A. 715); *Morton v. Young*, 55 Me. 24 (92 Am. Dec. 565); *Langford v. Boston R. R.*, 144 Mass. 431 (11 N. E. 697); *Sartwell v. Parker*, 141 Mass. 405 (5 N. E. 807); *McCormick v. Sisson*, 7 Cow. (N. Y.) 715; *Lamprey v. Hood*, 73 N. H. 384 (62 Atl. 380); *Welch v. Cheek*, 125 N. C. 353 (34 S. E. 531); *Russell v. Morgan*, 24 R. I. 134 (52 Atl. 809). In an early case Lord Tenterden said: "I think this mode of termination does not furnish any evidence that the action was without probable cause. If this should be allowed, the defendant would be deceived by the consent, as, without that, he would certainly have gone on with the action, and might have shown a foundation for it. I have no doubt about it." *Wilkinson v. Howel*, 1 M. & M. 495. The reason for the rule seems to be that where the termination of the case is brought about by a compromise or settlement between the parties, understandingly entered into, it is such an admission that there was probable cause that the plaintiff can not afterwards retract it and try the question which by settlement he waived. *Emery v. Ginnan*, 24 Ill. App. 65.

But in many of these cases exceptions are created to the effect that the settlement must have been voluntary and understandingly made. For instance, in *Morton v. Young*, *supra*, the Supreme Court of Maine said, among other things:

The same legal consequences do not follow acts done under duress of arrest and protest as when done freely and voluntarily, under the abuse as under the legitimate use of legal process. Suppose that, instead of settling the defendant's demand, the plaintiff had given him a deed or bond, how could he defend an action brought on

such instrument if the fact of his giving it is conclusive evidence that the defendant had a valid claim against him? Is the plaintiff the worse off for having paid his money than he would have been if he had given a deed or bond to get his liberty? . . . There is nothing in principle, and we have not found anything in authority, which places a party upon less favorable footing who pays his money to procure his release from arrest on a groundless suit than he who gives his bond or deed for the same purpose. If he may avoid the latter, he may recover the former. . . . The law does not make successful wrong a shield to protect its perpetrator from liability to afford redress to the injured party. If the wrongdoer has his hour of triumph, his hour of retribution is sure to come at last. The man who falsely, maliciously, and without probable cause sues out a process, arrests another, and compels him to pay money to procure his liberty commits a wrong for which the law affords the sufferer redress in damages. The suing out of legal process is an abuse of the law to cover the fraud, the very wrong which the action for malicious prosecution was instituted to redress. It would be a reproach upon the law if it should allow the payment of the money thus wrongfully and illegally extorted from the plaintiff to have any legal effect against him. In *Watkins v. Baird*, 6 Mass. 506 (4 Am. Dec. 170) the court, Parsons, C. J., held, not only that a deed given to procure the deliverance of a party from unlawful arrest and imprisonment on a groundless claim was void, but that an action of malicious prosecution might properly be maintained. *Pierce v. Thompson*, 6 Pick. (Mass.) 193.

Again in *Marcus v. Bernstein*, 117 N. C. 31 (23 S. E. 38), the Supreme Court of North Carolina said:

In *Langford v. Railroad Co.*, 144 Mass. 431, 11 N. E. 697), it was held that: 'Where a *nol pros.* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party can not have an action for malicious prosecution.' We do not think, however, that the facts in the present case make an exception to the general rule. The plaintiff protested all the time that his arrest was malicious and without just cause.

There was no compromise, as the plaintiff only paid his debt, which he was in duty bound to do, and the defendant paid the cost of prosecution. This was the arrangement or agreement, and nothing appears to show that the plaintiff procured the *nol. pros.*, any more than that the defendant entered it on his own motion. In fact, his paying the costs rather indicates his desire to have a '*stet processus*,' as it is called in the early books, and also indicates that his action was instituted more for the purpose of collecting his debts than because of any criminal offense, or from any patriotic motive, which purpose can receive no sanction in this court, and should not be encouraged in any court. It is an unauthorized mode of the strong controlling the weak. 'Procure' means 'to contrive, to bring about, to effect, to cause.' Webst. Dict. 'Procure' means action, and the *nol. pros.* must have been at the instance or request of the plaintiff. If it can not be seen at whose instance the dismissal was entered, then the general rule prevails, because the reason and the grounds upon which the exception is based do not appear.

In *Robbins v. Robbins*, 123 N. Y. 597 (30 N. E. 977), the Court of Appeals of New York said:

The rule, requiring that before an action for malicious prosecution can be maintained the plaintiff is bound to show a termination of the criminal proceeding, has for its foundation that it can not be known that the prosecution was unjust or unfounded until it is terminated; and, if the action for malicious prosecution were allowed to be maintained before the termination of the criminal proceeding, the plaintiff might be found guilty in that proceeding and yet maintain her action for malicious prosecution on the ground that she was not guilty, and that the defendant had no probable cause to believe her guilty; and thus there might be two conflicting determinations as to the same transaction. The law so far encourages criminal complaints as to protect the complainant against a civil action for damages in case the criminal proceeding, fairly conducted, results in the conviction of the person charged with crime. Such conviction, fairly obtained, without fraud or conspiracy, is held to be conclusive evidence of probable cause. But where the criminal proceed-

ing is terminated favorably to the accused, or without his conviction, so that there can be no further prosecution of the alleged offense without the commencement of a new proceeding, then there has been a sufficient termination thereof to enable him, proving the other requisite facts, to maintain an action for a malicious prosecution. It can not, in reason, make any difference how the criminal prosecution is terminated, provided it is terminated and at an end. Take a case like this: A poor and helpless woman is arrested, and the police justice informs her, before he makes his final decision, that he is inclined to hold her to bail, and she, being friendless and unable to furnish bail, promises good behavior in the future if he will discharge her, and then he enters a discharge. What reason can there be for holding, in such a case, if she can show that the criminal proceeding was instituted maliciously and without probable cause, that she may not maintain her action for malicious prosecution? The circumstances under which she was discharged may furnish competent evidence upon the issue of probable cause and malice and on the question of damages; but proof that the discharge was made under such circumstances can not, upon principle, furnish an absolute bar to the action. The motive of the judge or justice in making the discharge is wholly immaterial. The real foundation of the action is the malicious prosecution without probable cause, and the termination of the criminal proceeding is a mere technical matter, in no way concerning the merits of the action, and is a mere condition precedent to its maintenance. Therefore any termination such as we have above mentioned as a general rule furnishes the condition precedent.

Some of the expressions found in this opinion we do not approve, for to our minds they carry the rule too far. We cite the case for what it is worth, and as an authority which recognizes an exception to the general rule already stated. *Craig v. Ginn*, 3 Pennewill (Del.) 117 (48 Atl. 192, 94 Am. St. Rep. 77, 53 L. R. A. 715), contains a review of the authorities upon the proposition, and the suggestion is there made that, if the settlement is procured by fraud or duress, the dismissal of the pro-

ceedings by the prosecutor is such a termination of the case as will authorize an action for malicious prosecution. In *White v. Apsley Rubber Co.*, 194 Mass. 97 (80 N. E. 500, 8 L. R. A. (N. S.) 484), the court said:

A warrant having been issued, he was arrested at his home, and, after being detained in custody for an appreciable time by the officer serving the process, he was released, while no further steps were ever taken in the prosecution of the case. Upon conflicting evidence, the weight of which was wholly for the jury, they further could find that the criminal proceedings were instituted solely for the purpose of coercing the plaintiff to abandon any claim or right he might have to occupy the house as a tenant, and that when this object had been accomplished by a surrender of his tenancy, and the removal of his family and household goods, he was released from arrest. Indeed, it must have been perfectly plain, if either his evidence or that of his wife was accepted as substantially stating what occurred, that the criminal law was invoked, not for the purpose of vindicating justice, but to get rid of a troublesome tenant. If so found, there was an abuse of criminal process, and this is sufficient to support an action against the instigator and promoter of the wrong. *Wood v. Graves*, 144 Mass. 365, 366 (11 N. E. 567, 59 Am. Rep. 95); *White v. Apsley Rubber Co.*, 181 Mass. 339 (63 N. E. 885).

In *Smith v. Markensohn*, 29 R. I. 55 (69 Atl. 311), the Supreme Court of Rhode Island said:

There was conflicting testimony as to whether the rent was due at the time of the plaintiff's arrest, and as to whether he then denied it to be due. The jury evidently found that the plaintiff was not indebted to the defendant when arrested, and that he did not so admit, but the contrary. They also apparently found that the defendant either did not believe, or was not reasonably entitled to believe, that the plaintiff was indebted to him when he caused his arrest. Upon the testimony and the appearances of the witnesses on the stand, I think the jury amply warranted in so finding, and upon such findings and fact

duress by imprisonment might be construed to exist. *Strong v. Grannis*, 26 Barb. (N. Y.) 122; *Watkins v. Baird*, 6 Mass. 506 (4 Am. Dec. 170); *Richardson v. Duncan*, 3 N. H. 508; 9 Cyc. 444, and cases cited; 10 Am. & Eng. Ency. of Law (2d Ed.) 322, 324. If a person arrested while protesting that he is not indebted to the person causing his arrest pays the money demanded simply to procure his freedom, he is not thereafter debarred from maintaining an action for malicious prosecution. *Morton v. Young*, 55 Me. 24 (92 Am. Dec. 565). The cases cited by the defendant are not necessarily inconsistent with the case last named as to the law. In the present case the testimony in my judgment required the submission of the question to the jury as to whether the payment of the \$20 was made in settlement or under duress to obtain his liberty. The verdict of the jury is, in effect, that the payment was made under duress and protest, and that there was want of probable cause. I think that the jury might properly so find upon the evidence.

In this connection, and to the end that our conclusions may not be misunderstood or misinterpreted, it is deemed important to differentiate some of the cases cited in support of the general rule, and elaborate somewhat upon the rules obtaining in this jurisdiction with reference to the action of malicious prosecution. As a general rule such an action will not lie in this state for the prosecution of a civic suit, no matter how malicious the plaintiff may have been in bringing it. *Smith v. Hintrager*, 67 Iowa, 109; *Wetmore v. Mellinger*, 64 Iowa, 741. But, if there be a seizure of goods or an arrest of the defendant, then such an action will lie, although the original proceedings be of a civil nature. In many of the cases which announce the general rule above stated, the doctrine prevails that one may be held liable for maliciously prosecuting a civil action, although there be no arrest or seizure or detention of goods. Again, we have recognized a distinction between the maliciously suing out of a writ and an improper use of the writ after it has been sued

3. SAME.

out, although distinctly pointing out that the actions are of the same general character.

To be entitled to recover for malicious prosecution, a plaintiff must show (1) the previous prosecution; (2) the instigation or procurement thereof by the defendant; (3) the termination thereof by the acquittal or discharge of the plaintiff; (4) want of probable cause for the prosecution; and (5) that it was malicious. There must be such a disposition or termination of the original case as that it can not be renewed, but the prosecutor, if he proceeds further, must be driven to a new proceeding. A verdict of acquittal in a criminal case, a discharge of the defendant after a preliminary examination, or a voluntary dismissal of the action either by the prosecuting witness or by the prosecuting officer is held in this state to be a termination of the suit. *Farmer v. Norton*, 129 Iowa, 88; *Hidy v. Murray*, 101 Iowa, 65; *Green v. Cochran*, 43 Iowa, 544; *Miller v. Runkle*, 137 Iowa, 155. Upon the last proposition, however, authorities are conflicting. See *contra*, *Bacon v. Towne*, 4 Cush, (Mass.) 217; *Cardinal v. Smith*, 109 Mass. 159 (12 Am. Rep. 682); *Langford v. Boston, etc.*, 144 Mass. 431 (11 N. E. 697). But see *Graves v. Dawson*, 133 Mass. 419.

Even if there be a conviction in the main case, the plaintiff in an action for the malicious prosecution thereof may still recover if he shows that the testimony, upon which the conviction was had, was false and without foundation in law. *Bowman v. Brown*, 52 Iowa, 437; *Olson v. Neal*, 63 Iowa, 214.

In the event of acquittal, the defendant in a suit for malicious prosecution may show that plaintiff was in fact guilty of the crime charged, and such showing will be a complete defense to the action. *Parkhurst v. Masteller*, 57 Iowa, 474.

Of course, in any case, if the defendant can show

4. SAME: essential elements.

5. SAME: right of recovery: effect of conviction.

that he had probable cause for prosecuting the action, this is a complete defense. So that, as we understand the

6. SAME: prob- cases, if one is being prosecuted for malici-
able cause. ously prosecuting a civil suit, a compromise
and settlement of that suit by the payment of money,
either upon defendant's procurement or by a settlement
understandingly made and without duress, is a distinct
admission of liability on his part, and the dismissal of
the suit pursuant to such a settlement is not a termination
thereof in defendant's favor, but, on the contrary, a distinct
admission on his part that something is due.

It is a universal rule that, if one makes use of the
criminal law for some collateral or private purpose rather
than to vindicate the law, as to compel the delivery of
property or the payment of a debt, such
7. SAME: proceedings will be deemed to be malicious.
malice.

And, if one substitutes a criminal prosecution knowing that
a civil wrong only has been committed, he will be deemed
to have acted maliciously. *Williams v. Kyes*, 9 Colo. App.
220 (47 Pac. 839); *Ross v. Langworthy*, 13 Neb. 492
(14 N. W. 515); *Lueck v. Heisler*, 87 Wis. 644 (58 N.
W. 1101).

Ordinarily, when one begins a criminal proceeding
in good faith, it should be prosecuted to the end that the
law may be vindicated, and our statutes make it a crime
for one to compound an offense. See Code, sections 5301,
4889, 4890. But the statutes also provide that certain
offenses may be compounded. The sections permitting this
read as follows:

When a defendant is prosecuted in a criminal action
for a misdemeanor, for which the person injured by the act
constituting the offense has a remedy by a civil action, the
offense may be compromised as provided in the next section,
except when it was committed: (1) By or upon an officer
while in the execution of the duties of his office: (2)
Riotously; or (3) With an intent to commit a felony. (Code,

section 5622). If the party injured in such a case appear before the court to which the papers on a preliminary examination are returned, at any time before trial on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein and entered upon the minutes. (Code, section 5623). The order authorized by the last section is a bar to another prosecution for the same offense. (Code, section 5624). No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed except as provided in this chapter. (Code, section 5625.)

By the express language of these statutes no public offense can be compounded nor proceedings stayed except as provided in the acts quoted. There is no claim that

8. SAME: these sections were followed in this case,
 termination and it also appears, from the record made
 of prosecu- before the justice, that the case against the
 tion. plaintiff was dismissed and the costs taxed to Marshall
 county. This was a sufficient termination of the proceedings
 under the authorities already cited.

The only question left then in this, Was there such a settlement of the criminal case as to preclude the plaintiff from maintaining the action for malicious prosecution?

9. SAME: This is a mixed question of law and fact,
 settlement of and we may assume, for the purpose of the
 prosecution: case that, if the plaintiff voluntarily pro-
 duress: cured the dismissal and intentionally, under-
 evidence. standingly, and without duress settled the matter, he has
 no standing in court with his action for malicious prosecution,
 although the action was a criminal one, and the necessary
 steps were not taken which would authorize a compromise
 and compounding of the offense. This concession
 is made simply *arguendo* and without the purpose or

intent of holding that one may bring a criminal action for the purpose of enforcing the collection of a debt, and, having been successful in getting the money, may then dismiss the action, and be free from liability. Admitting for the purpose of the discussion that one may be precluded from prosecuting such an action by voluntarily procuring its settlement and dismissal, it is quite clear we think, under the later and more modern authorities, that this must be voluntarily and understandingly done and for the purpose of putting an end to the proceedings. If the settlement is brought about by duress, then it should not be held a bar to an action for the malicious use of the processes of the criminal law. Going now to the testimony, we find the following with reference to the alleged settlement and compromise. These excerpts are taken from the record for the purpose of showing the nature of the alleged settlement according to the plaintiff's contention:

Plaintiff testified in substance as follows:

In the afternoon of that day I went to my brother-in-law's house on the east side, and between six and seven o'clock Mr. Crane and Mr. Wilson, the constable, I think it was, came up to the house. Mr. Crane came up, and said: 'The constable is coming down, and will give you another chance to turn this money over.' I did not see the constable while he was talking. I said I was willing to turn it over if they were willing to settle with me for everything. He said he couldn't do that; he didn't have that authority; that the constable was coming down there, and, unless I turned it over, he would let the constable arrest me. After that the constable came up and served his warrant and took me away. Mr. Crane started off with us. He walked down the street with us, down town to the police station, and, when we got down there, he said: 'I will give you another chance to turn this money over,' and I said, 'I have told you how I would turn it over, when you are ready to settle with me.' That was just as we turned into the police station, and about 8 o'clock at night. They took me into the police station and put me in a cell, searched me, and

took my money and watch and whatever I had in my pocket. I asked to telephone to an attorney, and they would not allow me to do that. They said they would telephone, but I heard from no one. In about two hours the constable came down and took me to Crane's office. I went into his office. I was not taken up to his office at my request. I did not request it. His office was located about a block and a half from the police station. I was taken into the office and into the presence of Mr. Crane, and Mr. Crane said: 'White, if you will turn over this money, we will release you and let you go;' and I said to him that I would turn it over if they wanted to settle with me the same as I said, in full. He said they wouldn't do that. Well, I said, I would like to have a chance to get bonds, if I could. He said he would call the thing off, and he called the constable in, and the constable said that the best thing for me to do was to turn the money over, and Mr. Crane would see that I would not have to go to Marshalltown. Mr. Hench was there, and said my wife was crying and was very nervous, and that it was the best thing I could do. I wasn't able to get any bail, so I thought that was the best thing, to turn the money over to them. The constable was out in the hall. He was walking up and down the hall past the door, and I was in his custody all the time. I turned the money over and went home about ten o'clock. I went to my brother-in-law's house. My family were up there. . . . 'Mr. Crane,' I said, 'I would rather let it go into court, or something, give bond.' And Mr. Crane said: 'If that is the way you are going to do, we will not go any further with it. We will call it off, or something of that kind.' . . . I don't know just what he did mean. He said, unless the money was turned over, he would call it off. I don't know what he meant. Those were the particular words. I did not understand that he would call off a settlement. After he said that he would call it off, he called the constable in, and the constable said that, unless the money was turned over, he would have to take me to Marshalltown with him; and after that, the money was turned over. He spoke these words shortly after I went in there. I wanted Mr. Crane to allow me the \$20 in the trunk, and he would not do it. I said that I would prefer to let it go on, or

something to that effect. Mr. Crane allowed me the commission and my salary check, also for the two days, but did not allow for the \$20 on the trunk outfit. The only thing unsettled at that time was pertaining to the trunk outfit.

Another witness, a brother-in-law of the plaintiff, also testified as follows:

Mr. Crane had been to my house that forenoon about getting Mr. White to return the money. He was there when the arrest was made. Q. Did you telephone to Crane's house that night after Mr. White had been arrested? A. Yes; and talked to Mr. Crane over the phone. I asked him if we put up that money if he would release Mr. White or get him released from the jail. He said he would, to come over there, or he would come over to the office and see about it. Q. Did he ask you to come to the house? A. I don't recall that he did. I think I said to him that I would rather see him at the office. My object in calling Mr. Crane was not to settle the prosecution. I offered to furnish the money if he would release Mr. White and get him released that night on account of his family. I did not want to settle any prosecution. I did not want to settle anything, only to get Mr. White out of jail. That was all I was attempting to do. Mr. Crane told me to come to the office. I went over to Crane's office. I had money with me. I do not remember how much. . . . I did not know the amount that they were claiming from Mr. White. I knew somewhere near the amount. My idea was that it was somewhere around \$80 or \$90. I did not have that amount with me. I did not go over at the suggestion of Mrs. White. She did not talk to me about going over. I did not talk with any member of the family about going over. I simply went on own motion. I wanted to get Mr. White released. Mr. Crane was not at his office when I got there. I met him at the foot of the stairs. I think nothing was said in regard to this matter until we got into the office. I think Mr. Griswold and Mr. Kupfer were there. When I got into the office, I think I made the remark that it was rather a mean thing to do to have him arrested. Mr. Crane got very angry, took off his coat, and said he would beat my head. . . . Q. Did you ask Mr. Crane, 'Can't this matter be settled up?'

or words to that effect? A. I think so. I don't whether that was the next remark or not. I asked him if he would not release White if the money was put up, and he said he would; and I said, 'Then send for Mr. White.' Q. You asked him to send for Mr. White? A. I think I did. I asked to have him sent for to get him released. When Mr. White got over there, he turned over some money. Q. At your request Crane sent for White, didn't he, Mr. Hench, in order that enough money might be put up there? A. Yes, sir. Q. White and the officer came in? A. Yes, sir, I think there was present White, Crane, the officer and myself. Q. Mr. Crane had two checks there didn't he? A. They had some papers I believe. Mr. White indorsed those two checks, I believe. Q. Mr. Crane explained to him that he could indorse the two checks and turn them in as cash? A. Yes. I think Mr. White consented to sign the two checks. He did sign them as a matter of fact, and gave them to Mr. Crane. Mr. White paid a part of the money, and I made up the balance. Q. After you made up the \$89.10, there was something due for court costs, about \$10? A. Yes. The whole amount was made up between us. I put up about \$26 and Mr. White the balance. I did not know that Mr. White got a receipt. I did not see Mr. Crane sign a receipt. They were at a table. I was off quite a little ways, and paid no attention to their settlement. I was not there to settle the thing for them. Mr. White and Mr. Crane did the figuring. Mr. White had a pencil in his hand, writing. I did not pay much attention to the details of the conversation. I did not know that they had passed receipts. I was in the office probably an hour. They talked about the amount of the costs and his release, and the right of the constable to release him. Q. It was understood that White was to turn over the money and the amount of the costs, and the constable was to release Mr. White? A. Yes. He was released. I testified on the former trial that I wanted to pay up the money and get him released. I do not know what he means by settlement. Q. Wasn't this question asked you, 'It was understood at that time between you and Mr. Crane and Mr. White that White was to be released from custody of the officer and the criminal prosecution dismissed,' and you answered that 'Yes'? A. Yes; that is correct. Q. Now the amount that was allowed

Mr. White there over and above what was included in the checks was for two days' salary for work done the week he was discharged? A. I believe it was. Q. Was not this question asked you at the other trial in this case: 'Q. You wanted to settle the matter for him, White'? And did you say 'Yes'? A. Yes. Q. Was not this question asked you: 'Q. It was at your instance and request that Mr. Crane sent for Mr. White, wasn't it'? And didn't you answer, 'Yes'? A. Yes, sir. Q. Was not this question asked you: 'You told Mr. White there when he was brought over, White, you must settle this up, or words to that effect, didn't you'? A. Yes sir. Q. Was not this question asked you: 'You told him you would furnish the money'? And didn't you answer that, 'Yes'? A. Yes, sir. Q. When Mr. White was brought up there, did he do or say anything in the way of protest against his owing this claim? A. He protested against this settlement. He said he did not want to settle that way. He said he wanted to settle the way he first wanted to settle with Mr. Crane, less the amount that was due him. I can not say whether Mr. Crane gave him a receipt in full of all matters. I did not know what any of the papers signed contained. I did not look them over. Mr. Crane came to the house to have Mr. White sign some papers later in the night after Mr. White had been released. He said then that he didn't think Mr. White meant to take the money or embezzle it.

From this testimony a jury was justified in finding that the alleged settlement was not by plaintiff's procurement; that the money was paid under protest and for the purpose of securing plaintiff's release and to prevent his being taken to Marshalltown; that the payment was not voluntary, but under duress, and that the whole proceeding was resorted to, not for the purpose of vindicating the law, but to compel plaintiff to make a settlement of his accounts with the defendant Text-Book Company, or rather such a settlement as the company's agent insisted the plaintiff should make. There was not a complete adjustment of all matters between the parties, nor was the payment of the money intended as a final adjustment. Some matters were

still left open. The trunk account was left unsettled, and it seems that plaintiff agreed to "stand certain attorney's fees to be taken from his trunk refund." Surely under such a state of facts it should not be held as a matter of law that plaintiff secured his release by his own procurement, or that he voluntarily settled his account with the Text-Book Company and compromised their difficulties. To so hold would be a reproach to the law. Assuming, without deciding, that one charged with a crime may, without authority of court, compromise and compound it, or procure his release from the charge in such a manner as to bar him from maintaining an action for malicious prosecution, it must appear, we think, that the one accused voluntarily procured his release, that his payment was in full settlement of his accounts and for the purpose of extinguishing a conceded indebtedness, and that this payment was freely and voluntarily made; that is to say, not under protest or by reason of duress. Any other rule would encourage resort to the criminal law for the purpose of enforcing a debt and the greater the wrong the less liability to punishment. It may be that some of the courts whose opinions we have cited would hold plaintiff barred of relief by reason of the claimed compromise and settlement; but we are not prepared to go to that extent. Our view is that the questions as to the nature and effect of the settlement should have gone to the jury under proper instructions, leaving it to that body to say whether or not there was a voluntary compromise and settlement brought about by plaintiff's procurement.

For the error pointed out, the judgment must be, and it is—Reversed.

GUSIE SEWING, v. HARRISON COUNTY, Appellant.

Negligence: CUSTOM AS A DEFENSE. The usual custom of performing
1 work is not a defense to a charge of negligence for performing it in a like manner; as defendant can not avoid liability, if negligent, by a showing that it had always been negligent in the same respect.

Same: REPAIR OF BRIDGES: SPECIAL FINDING. Where two or more
2 causes unite in producing an accident, all of which are proximate, because without the operation of all no injury would have occurred, liability therefor exists. Thus where a county, in repairing a bridge, piled lumber on the bridge; failed to nail down new plank already laid, and piled old plank on the approach to the bridge; and it appeared that plaintiff's team became frightened at the pile of new plank, then by the rattle of the unnailed plank and afterward was still further, frightened by the pile of old plank, and all three grounds of negligence were submitted to the jury as charged, with instruction that plaintiff could recover if defendant was negligent in any or all respects, a special finding that the pile of old lumber at the end of the bridge was not the original cause of the fright of the team, and that the accident would not have occurred except for its fright thereat, did not negative negligence in the other respects charged and was not therefore inconsistent with a general verdict for plaintiff.

Same: BRIDGES: APPROACH. Whether the approach to a bridge is
3 part of the bridge is usually a question for the jury, and in this instance the evidence justified a finding that the pile of old lumber at the end of the bridge occupied a part of the approach.

Same: INSTRUCTIONS. With a finding that the old lumber was piled
4 on the approach to the bridge, an instruction that defendant might be found negligent in piling the same where it would frighten teams while on the bridge or approach thereto, was not prejudicial to defendant.

Same: ASSUMPTION OF FACTS. The court's statement that it was
5 conceded that when the men quit work the laying of the new floor of the bridge was not completed, could not have been understood to mean that one of the grounds of negligence charged, failure to nail the new plank, was conceded.

Same: PERSONAL INJURY: VERDICT. A verdict for \$5,394.52 is held
6 not so excessive as to indicate passion and prejudice, where it
appeared that plaintiff's spine was so injured as to permanently
affect her nervous system and general health, and that she had
suffered great pain as a result.

Appeal from Shelby District Court.—HON. E. B. WOOD-
RUFF, Judge.

THURSDAY, MAY 16, 1912.

THE facts are stated in the opinion.—*Affirmed.*

T. C. Smith and Sanford H. Cochran, for appellant.

Saunders & Stuart, and *D. O. Stuart*, for appellee.

SHERWIN, J.—The defendant built and maintained a bridge over the Boyer river, on a north and south highway. Its servants were replanking this bridge, and, when they quit work on Saturday, they had laid new oak plank on all but about sixteen feet of the bridge. They left a pile of new plank on the west side of the bridge, about midway of its length, and a pile of the old plank at the north end of the bridge, on the east side of the dirt roadway. On Sunday morning the plaintiff with her father and mother and other members of the family were in a conveyance, going north on said highway; her father driving the team of two horses. They drove onto the bridge from the south, and when they reached the pile of new plank, the team became frightened thereat, shied to the east, and started to run. Some of the new plank that had been placed on the floor north of the center of the bridge had not been spiked down, and, when the team was running over them, they moved, and contributed to the fright of the team, and, when the north end of the bridge was reached, the team was still further frightened by the old pile of plank,

shied at that, and ran into the ditch on the west side of the turnpike, where the wagon was turned over, and the plaintiff injured. The charges of negligence were the leaving of the pile of new lumber on the bridge, the leaving of the plank on the floor of the bridge loose and unspiked, and the leaving of the old plank at the north end of the bridge and on the embankment or approach thereto. In answer to special interrogatories, submitted to the jury at defendant's request, the jury found that the pile of old lumber near the north end of the bridge did not cause the team to take fright and run off from the bridge; that the pile of old lumber was beyond the railing of the approach to the bridge, but on the approach thereto; and that the accident would not have happened had the team not scared at the old lumber. The jury returned a verdict for the plaintiff in the sum of \$5,394.52, whereupon the defendant moved for a judgment on the special findings, notwithstanding the general verdict. This motion was denied, and judgment rendered for the plaintiff. Appellant complains of two or three rulings on the introduction of evidence, but they are of minor importance and could not have been seriously prejudicial to defendant, even if technically wrong.

The claim that it should have been permitted to show that it followed its usual custom in repairing this particular bridge is without merit, because it can not evade liability for its negligence on the ground that it was always negligent.

The defendant's real contention is that it should have had a judgment on the special findings, and that the court erred in instructing that the defendant might be found negligent for piling the old lumber where it would frighten a team while on the bridge or approach thereto, whether the lumber was, in fact, piled on the approach to the bridge or not. We are of the opinion that the special findings are not incon-

1. NEGLIGENCE:
custom as a
defense.

2. SAME: repair
of bridges:
special
finding.

sistent with the general verdict. Three grounds of negligence were alleged: The piling of new plank on the bridge; the failure to fasten down some of the new plank already laid; and the piling of the old lumber at the north end of the bridge. The evidence shows without conflict that the team first became frightened at the pile of new plank, that this fright was increased by the loose condition of the new plank in the floor, and that the pile of old lumber contributed to the fright, and caused the team to swerve to the west, where it went over the embankment. All of these grounds of negligence were submitted to the jury, and they were instructed that a recovery might be had if it was found that defendant was negligent in any, or all, of the respects charged. The special findings are not that there was no negligence in leaving the pile of plank on the bridge, or in the failing to fasten down the new plank in the floor. The special findings go no further than to say that the old pile of lumber at the end of the bridge was not the original cause of the team's fright, and in finding that the accident would not have occurred if the team had not scared at the old lumber. The jury did no more than to say that, but for the pile of old lumber, the team would not have run off the embankment when and where it did. If the team had not been badly frightened, and partially, at least, beyond control when it first saw the old pile of lumber, no one can say that its fright then would have resulted disastrously. And the jury was justified in finding that, although the team was frightened and running as it approached the pile of old lumber, it would not have left the embankment had the pile not been there. It is a case, then, where two or more causes produced an accident, all of which causes are proximate, because, without the operation of all, no injury would have been inflicted. And in such cases liability exists. *Walrod v. Webster County*, 110 Iowa, 349; *Harvey v. Clarinda*, 111 Iowa, 528; *Gould v. Schermer*, 101 Iowa, 582. The record shows that the

bridge in question is a part of a turnpike highway something over a mile long. But it was shown on the trial that the general level of this embankment north of the bridge was two feet lower than the bridge and that the embankment was raised and narrowed to connect with the bridge. It was also shown that the old lumber was piled along the top of this embankment, with the south end of the pile two or three feet north of the bridge.

If it was so piled, it occupied at least a part of the higher embankment, and the jury was not without evidence to sustain its finding, in effect, that the old lumber occupied a part of the approach to the bridge.

3. SAME:
bridges:
approach.

Whether an approach to a bridge is a part of the bridge is generally a question for the jury. *Nims v. Boone County*, 66 Iowa, 272; *Moreland v. Mitchell County*, 40 Iowa, 394. But in the trial of this case below, and in argument here, it seems to be taken for granted that, if the old lumber rested on the additional fill made necessary to reach the bridge, its location there might be negligence for which the defendant would be liable.

And with a finding that this lumber was on the approach the defendant could not have been prejudiced by the instruction to which we have referred, even though wrong. It is claimed that certain instructions assumed the truth of facts which were in dispute, but we think this complaint without foundation.

4. SAME:
instructions.

The statement of the court that it was conceded that, when the defendant's men left Saturday night, the work of putting down the floor was not completed, was not error. It could not have been understood to mean that the new plank placed in the floor were left unspiked, and it was conceded that the work of replanking was not then finished.

5. SAME:
assumption
of facts.

The instructions asked by the defendant, so far as

applicable to the facts, were sufficiently embodied in those given by the court on its own motion.

Appellant contends that the amount of the verdict shows that it was the result of prejudice, and asks that it be set aside because thereof. While no bones were broken in the accident, the evidence does show that the plaintiff's spine was seriously injured, and that such injury has probably permanently affected her nerves and general health. While the verdict appears large for the visible injuries received, we can not say that it is beyond fair compensation for her pain and suffering, and the permanent injury sustained. We find no error for which there should be a reversal, and the judgment must therefore be *Affirmed*.

IDA COUNTY SAVINGS BANK, Plaintiff and Appellant, v.
WILL E. JOHNSON, Defendant and Appellee.

Real property: QUIETING TITLE: EVIDENCE. In this action for possession and to quiet title the evidence is reviewed and it is *held*, that there was an agreed price for the land and that defendant went into possession in anticipation of the mutual performance of the agreement.

Same: CONTRACT OF PURCHASE: PART PERFORMANCE. A vendee of real property may offset any claim due him from the vendor against the purchase price, but in the absence of any agreement the mere existence of such indebtedness will not operate as part performance of the contract.

Same: PLEADINGS: EQUITABLE RELIEF. Where the plaintiff asks simply for the possession of land, rents and profits and that his title be quieted, and the defendant pleads simply the conclusion that he bought the land and entered into possession, neither of the parties making any reference to the nature of the contract, whether executed or executory, or whether performed in whole or in part, the pleadings will not authorize equitable relief based on the contract, although existence of the same may appear from the evidence.

Account stated: EVIDENCE. The statement of an account for services rendered, which is accepted by the other party, constitutes an account stated, and no further proof of the items therein is necessary. The evidence in this case is held insufficient to establish the bill for professional services as an account stated.

Real property: CONTRACT OF PURCHASE: PLEADINGS: EVIDENCE. Although the failure of plaintiff, in an action for possession of land and to quiet title, to ask alternative relief by way of recovery of the purchase price may excuse defendant from pleading a counterclaim, still where the legal title is in plaintiff defendant is bound to justify his possession; and if he bases this right upon a contract of purchase he must plead and prove the contract and performance or tender of performance on his part.

Banks and banking: POWER OF OFFICERS. Although the directors of a bank, under the authority of its articles of incorporation, employed the vice-president to supervise and conduct its business, still the president had the authority to dispose of land acquired by the bank; and his act in so doing in this instance was valid, especially as the managing officer knew of and acquiesced therein.

Same: UNAUTHORIZED ACTS: BURDEN OF PROOF. A bank has the burden of proof in seeking to show that the acts of its officers were unauthorized.

Same: EVIDENCE. Authority of a bank official to act for it, or the ratification of his unauthorized act, need not be a matter of record on the books of the bank; it is a question of fact which may be otherwise shown.

Real property: CONTRACT PRICE: EVIDENCE. The evidence in this action is held to support the defendant's contention as to the contract price of the land in question.

Same: APPEAL: DETERMINATION OF ISSUES: REMAND. In this action plaintiff sought possession, rents and profits, and asked that his title be quieted to the land in controversy. Defendant pleaded purchase and possession and asked that his title be quieted. The evidence established defendant's contract of purchase and his possession, but failed to disclose payment. There was evidence that defendant had performed services for plaintiff which might have been applied on the purchase price, but there was no showing of the amount of the services. Plaintiff's right of action for the price and defendant's action for the services are now barred. *Held*, that a reversal of the judgment for defendant would be inequitable; that defendant was entitled to an enforcement of the contract and to have his title quieted, but that he should pay the full

purchase price, subject to any offset for services, and the cause is remanded with leave to both parties to amend their pleadings to this end.

Appeal from Ida District Court.—HON. F. M. POWERS,
JUDGE.

FRIDAY, MAY 17, 1912.

ACTION to quiet title and to recover possession of a fractional forty acres of land. The defendant answered that he was in possession of the land in pursuance of purchase thereof from the plaintiff through its officers. By cross-bill he prayed that his title thereto be quieted. There was a decree for the defendant on his cross-bill, and the plaintiff appeals.—*Modified and Remanded.*

Charles S. Macomber, for appellant.

M. M. White and Johnston Bros., for appellee.

EVANS, J.—The plaintiff is a savings bank located in Ida Grove, Iowa. The alleged oral purchase of the land by defendant occurred in 1901. The plaintiff had recently acquired the land by foreclosure of a mortgage thereon. Prior to June 4, 1901, Hadlock was president and Dessel was vice president of the bank. On the date named, Dessel became president and Hadlock retired and soon thereafter removed from the state. The land was acquired by the bank in 1900. At about the same time, a contract of sale thereof was made to one Buss. By reason of some objection to the title, such sale was not consummated, and Buss became a renter of the property from the plaintiff for the year beginning March 1, 1901. The defendant was a practicing attorney, and was attorney for the bank in various suits pending at and before such time. He was also a stock-

1. REAL PROP-
ERTY: quieting
title:
evidence.

holder. It is the claim of the defendant that, shortly after the failure of the Buss contract, the managing officer or officers of the bank solicited him to purchase the same, and that he agreed with them upon a price, and that he took possession in pursuance thereof by renting the land to Buss in his own name for the ensuing year beginning March 1, 1902, and that he has continued in such possession ever since, with the knowledge and acquiescence of the bank officers. On the other hand, the appellant contends that there never was a completed agreement between the appellant's officers and the defendant, and that in any event such officers of appellant were without authority to make the alleged agreement. We have therefore first to dispose of a question of fact relating to the alleged negotiations of 1901.

The defendant in his behalf called as a witness H. A. Dessel, the president of the plaintiff bank, and personally examined him as follows:

Q. Up to the time you left the bank you had made no efforts to rent this land for the year 1902? A. Not that I remember of. Q. Why? A. At that time, if I remember right, you had some talk with Mr. Hadlock relative to this piece of land. Q. Was it your understanding that I bought the land? A. My understanding was that you had concluded or agreed upon a price. Q. What was the price? A. To the best of my recollection was \$1,300 or \$1,350. Q. And you knew, or at least you understood, that I had some talk with Mr. Hadlock and had agreed on a price with the savings bank for this land? A. Certainly. Q. And you knew, after you talked with Mr. Hadlock or myself, or whoever it might have been, that the bank had lost title to that land, at least to such an extent that you did not think it was necessary, as the active manager in charge of the bank's interest, to give it any further thought, care, or attention, and you made no attempt to lease it for the year 1902? A. As I told you before that I understood, as near as I remember it, that Mr. Hadlock told me he had some kind of a deal with you, and as I told you, to the best of my

recollection, it was \$1,300 or \$1,350, or in that neighborhood anyway, and I spoke to you, wanted to get it fixed up. You said you had a claim against the Ida County Savings Bank. They were owing you. Q. In all the talks, the talk was not that I did not own the land, was it? A. The talk was, I talked from the standpoint of what Mr. Hadlock had told me, and you claimed that you had a bill against the bank. Q. In all the talks we might have had you never claimed that I didn't own this land? A. You certainly didn't own it because you didn't pay for it. Q. I had bought it, bargained for it? A. I say all I knew about it was that Mr. Hadlock told me that you had made a bargain for it. Q. There never was any dispute between you and I, at any time, was there, that I didn't own the land? A. I don't think we ever argued that question. Q. The whole talk was how it was to be paid for, that was the question, wasn't it? A. The question was to make a settlement of some kind. Q. A settlement of what? A settlement of what I paid for the land, wasn't it? A. The dispute was just the same as the one that was brought up in the minutes of the board of directors to get a settlement—to get it out of the world. That was the dispute. Q. Mr. Hadlock told you that I had bargained for the land? A. As far as I can remember it; yes. Q. Hadlock told you that I had bargained for that land, and the price that I was to pay for it. Is that right? A. My recollection is that he had a deal with you and bargained for the piece of land that was unsettled, but the price was made. The land that I talked with Mr. Hadlock about was the land in controversy.

The defendant himself testified as follows:

Some time in the year 1901, and before September 13, 1901, that date I wrote to Mr. Buss regarding the renting of the land. At that time I owned the land because I was negotiating with Mr. Buss to rent it. The bank had the land and it was bringing but little rent. Mr. Dessel suggested to me that if I would buy it myself they would make a discount on what they offered it to Buss for. Then I went up there, I had talks with Mr. Dessel and Mr. Hadlock as to which one the deal was closed with, whether one or both. I can't remem-

ber positively, but the upshot of it was that they discounted the price to me \$100, as I understand it. I was to take the land for \$1,200. It was incumbered by judgments complicated that particular time I think by a suit, Chase v. Conry. That at the time I purchased this land from the bank they turned over to me the abstract of title together with the opinion of the loan company. I leased the land in the fall or early fall of 1901 to Mr. Buss. Mr. Buss went into possession under my lease in the spring of 1902, and he has continued under my lease under his tenancy with me from the spring of 1902 to the present time, paying me the rent.

The foregoing is the only testimony in the record relating to the negotiations. It is not very definite in its details. The details of the negotiations, however, are not of themselves of controlling importance if it is otherwise made to appear that an agreement for the purchase at a fixed price was in fact reached and that the defendant went into possession thereunder. No deed or writing of any kind was ever executed. The circumstance which bears most strongly against the defendant is that he has never paid for the land. Neither has he ever tendered payment in any formal way. It also appears that, at the time of such negotiations and afterwards, something was due the defendant from the plaintiff for attorney's fees in impending suits. On July 24, 1902, the plaintiff paid to the defendant a bill of \$521.65 for services to date in the district court in the "*Knepper* case." At a later time the plaintiff paid him \$1,000 in the "*Sidensticker* case." In the collection of these amounts by defendant from the plaintiff bank, no account was taken of the \$1,200, alleged purchase price of the land. As against this, however, it is claimed by the defendant that the plaintiff bank was owing him at the same time about \$525 for services rendered in other cases, principally the "*Willett* and *Heinrich* cases." He also claims that he was then expecting to perform other services, and especially in the *Knepper* case which had

been appealed to the Supreme Court, and he contends in his evidence that such services rendered, and thereafter rendered, were more than sufficient in amount to pay the full purchase price of the land.

Upon the whole record we think it must be said that the president of the bank and the defendant did agree upon a price for the land, and that possession was taken in anticipation of mutual performance of such agreement. The testimony of Mr. Dessel, president of the bank, will permit of no other conclusion at this point. It is earnestly argued by counsel for appellant that Mr. Dessel was mistaken in his testimony. His candor as a witness is conceded. The fact remains that for many years he has acquiesced in the possession of the land by the defendant upon the theory that he was to have a conveyance thereof upon payment of an agreed price. The defendant has collected all rent and paid all taxes without protest, until the bringing of this suit; the rent, however, being greater for each year than the tax. This long acquiescence on the part of the managing officers, with knowledge of the claim of defendant, is in itself in the nature of an admission by the corporation of the existence of such agreement. The weight of such acquiescence as an admission may be greater or less according to the circumstances.

Up to this point we are assuming authority in the president to make the agreement contended for. It is strongly urged by appellant that there was no such authority in the president. We will give that question further consideration later. The agreement, such as it was, was executory and was wholly unperformed on defendant's part. The agreement manifestly contemplated simultaneous performance by both parties. The defendant bargained for no credit nor for deferred time of payment. It was no part of the agreement that defendant's attorney's fees should apply upon the purchase price. This would not prevent the defendant

2. SAME: contract of purchase: part performance.

from offsetting any claim in his favor against the purchase price in a proper way. But the mere existence of such a claim, if any, did not operate as a part performance of the contract on defendant's part.

Were it not for the state of the pleadings, the equities of the case appear to us simple enough. Having found the existence of the agreement and possession thereunder, elementary equity would seem to require that the title should be awarded to the defendant on condition that he perform on his own part and pay the purchase price, with interest thereon from the date of the defendant's taking possession of the land. Equity would also require that the defendant be permitted to offset against the purchase price any valid claim held by him against the bank at the time of the commencement of this suit in 1908. But the plaintiff's petition asked only for possession of the land and for rents and profits and to quiet its title. It ignored the alleged agreement and asked no alternative relief in relation thereto. The defendant filed a cross-bill with his answer. He did not plead the terms of the agreement. He only pleaded as a conclusion that he had "bought" the land from the plaintiff and had taken possession under his purchase. There was nothing in his cross-bill to indicate whether the contract of purchase was executed or executory, nor whether it was performed in whole or in part by himself. The real nature of the controversy between the parties was disclosed only by the evidence. The defendant as a witness conceded that he had paid no part of the purchase price. He claimed a performance, however, in the sense that he had an account for attorney's fees against the bank to the full amount of such purchase price. He offered no evidence, however, to prove up such account for the purpose of having it offset against the purchase price. Neither did his cross-bill contain any reference to such account.

It should be stated here that on August 2, 1902, the
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3. SAME:
pleadings:
equitable
relief.

defendant prepared a statement of account against the plaintiff and receipted the same as follows: "Ida Grove, Ia., Aug. 2, 1902. Ida County Savings Bank,

4. ACCOUNT
STATED:
evidence.

Dr. to Will E. Johnston. To services in case Heinrich v. Ida Co. Sav. Bk., \$150.00.

To services in case Willits v. Bank, Supreme Court, etc., \$300. To services pertaining to liquidation of Ida Co. Sav. Bk. preparing contracts, deeds, advice, etc., \$25.00. To services preparing and filing answer, and trial of case of Engle v. Sav. Bk. J. T. Hallam et al., \$50.00. Total \$525.00. Received payment of the above and foregoing in full this 2d day of August, 1902. (Signed) Will E. Johnston."

It is the recollection of the defendant, and he so testified, that he delivered this receipted account to some of the officers of the bank to be applied as a payment upon the purchase price. Of course if this were done and it was assented to by the bank officers, it would amount to an account stated, and no further proof of the items of such account would be necessary.

But the evidence is seriously in dispute at this point. The defendant testified concerning the same as follows:

Q. Who did you give the bill to? A. I don't know, Mr. Easton or Mr. Dessel, undoubtedly. It had to be to Mr. Easton or Mr. Dessel; I can not be mistaken. I prepared a bill and a deed which was delivered to the one or the other of those two men or left with the bank for them. On the other hand, Easton and Dessel both testified positively that they never saw the statement prior to the trial. The defendant and the two opposing witnesses testified on the subject with manifest candor. The defendant candidly disclosed that the details of that particular transaction were not clear in his recollection. We would not be justified therefore, in finding this fact established over the positive denial of the other two witnesses concerned. It was therefore incumbent upon the defendant to make legal

proof of his account for attorney's fees in order to render the same available to him as an offset against the purchase price or as the equivalent of performance of the contract on his part.

It is perhaps true that the failure of the plaintiff to ask for alternative relief in the way of a recovery of the purchase price, excused the defendant from setting up a counterclaim for attorney's fees. On the other hand, the legal title being in the plaintiff, the defendant was bound to justify his possession. This required a pleading of the contract and a pleading of performance or tender of performance on his part. And this was especially so when he asked for affirmative equitable relief by his cross-bill. Under the evidence, the plaintiff was not entitled to the relief prayed for in its petition while the defendant stood ready to perform the agreement on his part. On the other hand, the defendant was not entitled to the relief prayed in his cross-bill except on proof or tender of full performance on his part. By ignoring the contract, the plaintiff pleaded no breach or rescission thereof. On the other hand, defendant pleaded no performance or tender of performance on his part.

The decree of the trial court granted the defendant full relief on his cross-bill and quieted his title to the land. The result of such decree was to specifically enforce against the plaintiff the executory agreement of sale. The fact that no performance was shown on defendant's part was wholly ignored in such decree. If such decree is permitted to stand, it will deprive plaintiff, not only of the land, but of the purchase price as well, because an independent action for the purchase price is apparently barred by the statute of limitations. On the other hand, if such decree should be reversed or modified to the extent of requiring the defendant to pay the agreed purchase price as a condition to the decree in his favor, then he would be deprived

5. REAL PROP-
ERTY: con-
tract of pur-
chase; plead-
ings: evidence.

of the right to offset against the purchase price his present claim for attorney's fees, an independent action for which is also apparently barred by the statute of limitations. We are confronted, therefore, with an unusual dilemma, for which the parties to the case must divide the responsibility, and we pass it for the moment.

II. It is strongly urged by appellant that the president of the bank had no authority to enter into the agreement contended for by appellee. Reliance is based upon article

6. BANKS AND
BANKING:
power of
officers.

6 of the articles of incorporation as follows:

"Art. 6. The affairs of the said corporation shall be managed by a board of five directors,

and those who shall manage its affairs for the first year are: J. T. Hallam, Thomas P. Hollander, F. L. Hadlock, A. T. Blackman and Julius Sauer." It is also urged that the authority of President Hadlock especially was abridged to some extent on February 5, 1901, by the adoption of the following resolution of the board of directors: "Be it resolved by the board of directors of the Ida County Savings Bank that H. A. Dessel, vice president of said bank employ his entire time in the supervision and conduct of the business of said bank under the direction of the board of directors, as president of the bank at a salary for such services as shall be agreed upon hereafter by the said board of directors and H. A. Dessel." In pursuance of this resolution, Dessel actually became president on June 4, 1901.

The defendant testified that Dessel himself first suggested the purchase of the land by him. He also testified that his negotiations were had both with Dessel and with Hadlock. Dessel only denies that the agreement was made with him. He fairly concedes that he understood the agreement to be made, but contends that it was so made with Hadlock. It must have been made after February 5, 1901, because Dessel himself leased the land on March 1, 1901. Inasmuch as Dessel knew of the negotiations

with Hadlock and Hadlock's agreement upon the subject and assented thereto by his acquiescence, the legal effect was the same as though both Dessel and Hadlock had participated personally in the agreement. In the light of the resolution of February 5, 1901, it seems clear to us that the negotiations for the sale were fairly within the presumptive authority of the president of the bank. The plaintiff had become an involuntary purchaser of the land. As a matter of law, it was forbidden to purchase such land as an original investment. Code, section 1851. It was permitted to acquire the same only by way of security for its previous loan. By the same statute it was required to dispose of the same within ten years. In the meantime it was carried on the books as an equivalent to the former loan. There is nothing in article 6 which provides the method by which the affairs of the bank should be managed by the directors. The method adopted by the board of directors was to appoint a president who should have "the supervision of the conduct and business of said bank under the direction of the board of directors." If in the making of this agreement the president violated or ignored the direction of the board of directors, such facts was within the special knowledge of the bank officers.

The burden was upon the plaintiff to show that the contract was not authorized or ratified by the directors. *White v. Creamery Co.*, 108 Iowa, 526; *Patterson v. Robinson*, 116 N. Y. 193 (22 N. E. 372); 7. SAME: *Bank v. Bank*, 141 Ind. 352 (40 N. E. 799, 50 Am. St. Rep. 330); *Smith v. Manufacturing Co.*, 148 Ind. 333 (46 N. E. 1000).
unauthorized
acts: burden
of proof.

The question is one of fact rather than of law. The question is not whether the articles of incorporation conferred power upon the president to make the agreement. It is whether it was within the fair scope of the direction imposed by the board of directors upon the president. In view of the ordinary character of the transaction, and in

view of the long-continued and open possession of the defendant and the failure of any officer of the bank to challenge the same for at least a period of five years or more, it leaves little merit to this particular contention.

It was shown that there was no record on the books of the bank showing an authorization by the board of directors. But the controlling question is, Was there

8. SAME: authority or ratification in fact? It was not
evidence. legally necessary that such authority and ratification appear of record. *Stetson v. Northern Inv. Co.*, 104 Iowa, 393; *Bank v. Bank*, 107 Mo. 133 (17 S. W. 644, 28 Am. St. Rep. 405); *Parsons Mfg. Co. v. Hamilton Ice Co.*, 78 N. J. Law, 309 (73 Atl. 254).

III. In view of our conclusion as to the existence of an agreement, it becomes important to determine what was the purchase price agreed upon. Only two witnesses

9. REAL PROP- testified upon this question—Dessel and
ERTY: con- Johnston. The recollection of neither was
tract price: evidence. very definite. Dessel fixed it at \$1,300 or \$1,350; Johnston fixed it at \$1,200. Turning aside from the testimony of these two witnesses for a moment, it is undisputed that the land was first bargained to Buss for \$1,200. This bargain failed because of the character of the title which was not acceptable to Buss. It is undisputed also that the land was charged on the books of the bank to their real estate account at \$1,186. These circumstances so strongly corroborate the defendant in this respect that we think the purchase price should be found at \$1,200.

IV. Having settled the foregoing finding of facts, we return to our dilemma. In view of the unusual state of the record, we deem it unavoidable to depart some-

10. SAME: appeal: what from the usual practice in equity cases.
determination It is our conclusion that there should be a
of issues: decree for the defendant for the enforcement
remand. of the contract and quieting his title, and that he should be held to pay therefor the full purchase price, with legal

interest as of March, 1902, subject, however, to the further proviso that he be permitted to offset against such purchase price in whole or in part any valid account held by him against the plaintiff at the time of the institution of this suit.

To this extent the decree of the trial court will be modified, and the case will be remanded to the district court in pursuance of such modification. The district court will give to the defendant an opportunity to plead and prove any valid offset, if any, to the purchase price. Leave will be given to both parties to amend their pleadings to this end, and final decree will be entered in the district court.—*Modified and Remanded.*

IDA B. KUHN and IDA B. KUHN as Guardian of CLAYTON C. KUHN, and FRANCIS D. KUHN and IDA B. KUHN as Administratrix of the Estate of CYRUS F. KUHN, deceased, Appellant, v. SARAH G. DOWNS, W. H. KUHN and BRICK P. KUHN, Appellees.

Partition: TAXATION OF ATTORNEY'S FEES. Attorney's fees are not
1 taxable as costs in favor of plaintiff's attorney in partition proceedings, where the parties join issue and the defendant in good faith employs independent counsel.

Same: APPEAL. The taxation of attorney's fees in partition proceed-
2 ings is for the benefit of the party to the action and not the attorney; so that the attorney has no right of appeal from an order refusing to tax the same as costs.

Appeal from the Pottawattamie District Court.—HON. O. D. WHEELER, Judge.

FRIDAY, MAY 17, 1912.

THE opinion states the case.

Saunders & Stuart and J. J. Stewart, for appellant.

W. H. Ware and Tinley & Mitchell for appellees.

WEAVER, J.—William H. Kuhn died, intestate, seised of some 800 acres of land in Pottawattamie county. He left surviving him his wife, Julia, and four children, Sarah G. Downs, William H. Kuhn, Brick P. Kuhn, and Cyrus F. Kuhn. Thereafter the widow, Julia Kuhn, died, intestate, and the entire property became vested in the four named children. Later Cyrus F. Kuhn died, intestate, leaving surviving him his wife, Ida B., and two minor children. This action was brought by the said Ida B. Kuhn in her own right, and as guardian of her said children and as administratrix of her husband's estate, for a partition of the lands above mentioned. She also alleged in her petition that defendants had for some time been in the possession and use of said property, and she prayed that they be held to an accounting of the rents and profits. To this proceeding the defendants appeared, admitting the ownership of the land by William H. Kuhn in his lifetime and the descent of the title to his children, as alleged, but averred that during the lifetime of the said Cyrus F. Kuhn, through whom the plaintiff in her own right, and as guardian and administratrix, claims title, they entered into a contract with him for the purchase of all his right, title, and interest in and to said property, and that under and by virtue of said contract defendants took and still retain possession thereof. They further alleged that upon the appointment of plaintiff as administratrix of the estate of said Cyrus F. Kuhn they tendered to her the agreed purchase price of said land, and demanded of her a conveyance thereof, and that she refused the tender, and refused to make the required conveyance. Upon these allegations, defendants asked that the petition be dismissed. By way of cross-petition, defendants pleaded

the same alleged state of facts, and, in addition thereto, alleged that said contract of sale to them included also the interest of the said Cyrus F. Kuhn in the personal estate left by their parents. They also alleged the tender of the price to plaintiff, as aforesaid, and their present willingness and readiness to perform the contract on their part, and asked that specific performance thereof be decreed. Plaintiff denied the cross-petition, and thereupon all the issues were tried to the court, resulting in a decree for plaintiff, as prayed.

The plaintiff and J. J. Stewart, Esq., who had acted as her counsel in said proceedings, then united in an application or motion, asking that an attorney's fee in their favor of \$618.25 be taxed as a part of the costs of the partition. This motion was denied, and from that ruling the plaintiff and J. J. Stewart appeal.

Under the provisions of the statute, as the same have quite frequently been interpreted by this court, the ruling appealed from is clearly correct. We had occasion to consider this statute and review the precedents relating thereto in the case of *Hawk v. Day*, 148 Iowa, 47. After due consideration, we there said: "We regard it clear that, where the title to the property is put in issue, the Legislature did not intend to impose the burden of paying any part of plaintiff's attorney's fees upon the opposing parties, who are represented by counsel of their own. The only justification for the practice of assessing such fees is in the fact that in a very large proportion of cases there is no contest over proportionate shares, and the proceedings are amicable in character and afford, in many instances, the easiest and most expeditious method of segregating the interests of tenants in common; and the attorney who institutes the action is serving the defendants, as well as the plaintiff. Under such conditions, it is entirely equitable to provide that the shares of all parties be made to contribute pro-

1. PARTITION:
taxation of
attorney's
fees.

portionately to the expense thus incurred for the common benefit. But, where the title or right of a party to share in the property is wholly denied, or his share, if any, is made a matter of dispute, and each employs the service of counsel, it would be signally unjust to require such contribution." See, to the same effect, *Oziah v. Howard*, 149 Iowa, 205.

The rule thus stated is, we think, a fair exposition of the legislative intent, and it accords as well with an enlightened sense of justice. The answer and cross-petition in the case before us did deny the plaintiff's title. Both parties were represented by counsel, and the issues were tried out to a final decree, adjudicating the rights of the parties; and there appears no legal or equitable reason why each should not bear the expense of his or her own counsel fees. It is, of course, true that if the defendant in such proceedings set up a hostile claim of title, which the court finds to be sham or frivolous, and is apparently pleaded simply to cast upon the plaintiff all the expense of a partition to which he is clearly entitled, such an issue will not be allowed to deprive plaintiff of the right to a taxation of attorney's fees. (*Hanson v. Hanson*, 149 Iowa, 86); but the record before us is not such as to impeach the good faith of the defense, and we find no reason for setting aside the order made by the court below.

Though the question is not argued, we think it proper to say that the attorney conducting a partition proceeding has no such interest in the taxation of costs as entitles him to appeal therefrom. Attorney's fees are not taxed in favor of counsel in any case. If taxable at all, it is in favor of the party to the action, and is in the nature of a reimbursement to him for an expense which he has reasonably incurred, and to which the entire property ought, in equity, to contribute.

For the reasons stated, the ruling of the district court is *Affirmed*.

JOE JUDGE and M. BUNTING, Plaintiffs, v. F. M. POWERS,
JUDGE, and E. V. TUTTLE, Defendants.

Intoxicating liquors: CONTEMPT: CONVICTION. A judgment of con-
1 tempt for violation of an injunction prohibiting the sale of liquor
is not a conviction within the meaning of the statute providing
that one convicted of the illegal sale of liquor, or permanently
injoined from making sales, shall not thereafter be permitted to
sell liquor for a period of five years, as the term "convict" ordi-
narily means a finding of guilt by the verdict of a jury.

Same: JUDGMENTS: IMMATERIAL FINDINGS. Where a judgment of
2 contempt for violation of a liquor injunction found that defend-
ant had violated the injunction on certain days, the further re-
cital that defendant thereafter complied with the law and the
terms of the injunction, and had been since that time lawfully
conducting the business, was immaterial and no part of the judg-
ment; as a judgment is the final determination by a competent
judge or court of matters submitted by the parties for decision,
and findings or recitals embraced in the same instrument, but
not essential to or involved in the judgment, will not affect its
validity.

Certiorari from Carroll District Court.—HON. F. M.
POWERS, JUDGE. .

FRIDAY, MAY 17, 1912.

THE facts are stated in the opinion.—*Affirmed.*

*B. I. Salinger and L. H. Salinger, and Ralph Mac-
lean, for plaintiffs.*

M. S. Odle, for defendants.

SHERWIN, J.—On the 8th day of December, 1908, the
plaintiffs herein were permanently enjoined from illegally

selling intoxicating liquors. After the injunction had issued, the plaintiffs continued the sale of liquors on the same premises, and on the 7th of December, 1910, an information was filed charging them with contempt for a violation of the injunction. On the 18th day of April, 1911, judgment against the defendants (plaintiffs herein) by consent was entered on that information, and they were fined. That judgment was rendered by Judge Hutchinson, and it was determined therein that the injunction had been violated on the 8th, 9th, 10th, and 11th days of December, 1908. The judgment further recited that "on the 12th day of December, 1908, the defendants complied with the provisions of the mulct law by doing the things prescribed by statute as a condition precedent to the conduct of said business, and have ever since and are now conducting their saloon and making sales of liquor in compliance with the law of the state regulating the same and in such manner as to not violate the injunction above referred to." Judge and Bunting still continued business at the old stand, and on the 3d day of October, 1911, a second information was filed charging them with contempt in violating the injunction after the 7th day of December, 1910. Upon a trial, the court found that defendants had violated the injunction since the 15th day of December, 1910, and they were again adjudged guilty of contempt and fined, whereupon this proceeding was instituted.

But two questions are before us for determination as we view the case, and they are both of law. The Thirty-Third General Assembly, chapter 142, section 3, enacted this law: "No person who shall be hereafter convicted of violating the laws of this state relating to the sale of intoxicating liquors, or shall be permanently enjoined by any court of this state for such violation, shall be permitted to sell intoxicating liquors in this state within five (5) years from the date of such conviction or injunction, and no

resolution of consent or permit shall be granted such person within said period."

On this branch of the case, the only question presented or argued by counsel is whether the judgment of April 18, 1911, decreeing these plaintiffs guilty of contempt, was a "conviction of violating the laws of this state relating to the sale of intoxicating liquors" within the meaning of section 3 of chapter 142, Acts 33d G. A. We have held that proceedings to punish for contempt in violating a liquor injunction are not criminal proceedings. *Gibson v. Hutchinson*, Judge, 148 Iowa, 139; *Brown & Bennett v. Powers*, Judge, 146 Iowa, 729; *McGlasson v. Johnson*, 86 Iowa, 477.

And it would seem to follow that the violation of an injunction in a nuisance case is not a crime as the word is ordinarily understood and defined. In the *Gibson* case, *supra*, we said: "It is a well-settled proposition that, while the proceedings to punish for contempt may in some features resemble hearings in criminal proceedings, and judgment of fine and imprisonment may be entered, yet the object and purpose thereof is not to punish a public offense but to compel obedience to and respect for the order of the court." The statute provides that words and phrases shall be construed according to the context and approved use of the language unless such words and phrases have acquired a peculiar and appropriate different meaning in law. It has always been the holding of this court that proceedings in contempt are not criminal, and this construction of the provisions of the statute punishing for contempt will be presumed to have been in the minds of the legislators when the statute under consideration was enacted, and the word "convicted" must be construed in the light of such knowledge. That the word "convicted" as here used has not acquired a peculiar and appropriate meaning different from its approved use is manifest, for

we have, in a sense at least, held otherwise in the cases already cited.

The word "conviction" ordinarily signifies the finding of the jury by verdict that the prisoner is guilty. *Hackett & Freeman v. Graves*, 103 Iowa, 296; Bishop, Statutory Crimes, section 348; *Quintard v. Knoedler*, 53 Conn. 485 (2 Atl. 752, 55 Am. Rep. 149). "Conviction is a technical term applicable to judgment in a criminal prosecution." Chief Justice Marshall in *Amnidon v. Smith*, 1 Wheat. 461 (4 L. Ed. 132). An ordinary conviction takes place in a criminal prosecution by indictment, etc., and may either consist of the prisoner's confession and plea of guilty or of the verdict of guilty found by a jury. 4 Blackstone, Com. 262; 1 Bishop, Criminal Law, section 223; Bouvier's Law Dict. 435. Webster defines the word "convicted" as the past participle of the verb "to convict," which means to prove or find guilty of an offense or crime charged. Where a license was made void if the person holding it suffer conviction by a court of competent jurisdiction, it was held that "conviction" meant either a finding by a jury that the prisoner was guilty, or else a judgment and sentence of the court upon a verdict or confession of guilt. *Commonwealth v. Kiley*, 150 Mass. 325 (23 N. E. 55). To same effect is *Hartley v. Henreta*, 13 S. E. 375 (W. Va.). "A 'conviction' is an adjudication that the accused is guilty. It imports all that the statute requires before holding one to bail, and, more, it involves not only the *corpus delicti* and the probable guilt of the accused but the actual guilt." *Nason v. Staples*, 48 Me. 123. A "conviction" is the finding of guilt. *People v. Adams*, 95 Mich. 543 (55 N. W. 461); *Egan v. Jones*, 21 Nev. 433 (32 Pac. 929); *State v. Barnes*, 24 Fla. 153 (4 South. 560); *Blair v. Commonwealth*, 66 Va. 850. We reach the conclusion that punishment for contempt was not a "conviction" of violating the laws of this state relating to the sale of intoxicating liquors.

II. There was evidence showing who some of the owners of property situated within fifty feet of the saloon were, and it was stipulated by the defendants, subject to objections as to the competency or materiality of such testimony, that the written consent of such owners, covering a period to December 31, 1910, was not then on file in the auditor's office. The court ruled that the defendants' objections were good and that it was immaterial whether consent had been given by such owners because of the recital in the judgment of Judge Hutchinson, and the matter ended there. The trial was closed, as we understand the record, on or about the 16th day of October, 1911, and judgment was rendered in the proceeding on November 18, 1911, in which, as already stated, the court found the injunction had been violated since December, 15, 1910. The specific objection made to the evidence touching the want of consent was and now is that there was an adjudication by Judge Hutchinson that defendants' business was lawfully conducted after December 12, 1908, and up to April 18, 1911, the date of his judgment. If prejudice were shown to have resulted because of the ruling of the defendant judge that the consent matter was immaterial, we should feel disposed to hold that he had no right to change his ruling, as he must be presumed to have done, without giving the defendants an opportunity to meet the new ruling by the introduction of further evidence if they so desired.

But the question of prejudice on that account is not before us. The only question before us is whether the judgment rendered by Judge Hutchinson was an adjudication of the matter now before us. We do not think it was. No issue was before him which warranted the statement in the judgment. The sole question for him to adjudicate was whether the defendants had violated the injunction before the information was filed, and this, we think, was all that his judgment did determine. True it is that he

recited certain preliminary facts, but this recitation of facts did not become any part of his final judgment proper. What he did adjudge and decree was that the defendants had violated the injunction by their acts on certain days in December, 1908, and, this being found, it was immaterial whether they had or had not complied with the law at all other times, and nothing further was said on the subject. It finally then comes to this. In his finding of facts, the court recited immaterial matter, but the real judgment was as we have stated.

A judgment at common law is the determination or sentence of the law pronounced by a competent judge or court "affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist." 23 Cyc. 665. "That only is a judgment which is pronounced between the parties to an action upon the matters submitted to the court for decision." 4 Words & Phrases, 3828; *Bullock v. Bullock*, 52 N. J. Eq. 561 (30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528). "A judgment is the final determination of the rights of the parties in an action." 4 Words & Phrases, 3829, and cases there cited. A judgment is the final and definite sentence or decision of the court by which the merits of a cause are settled or determined. *Coffey v. Gamble*, 117 Iowa, 545. A finding of facts or conclusions of law by the judge during or after the trial of the case, or his opinion upon matters submitted, whether oral or in writing, does not necessarily constitute a judgment; "it is not such a definitive sentence or adjudication as is contemplated by that term." 23 Cyc. 666, and cases cited.

And the findings and judgment may be incorporated in the same instrument without affecting the validity of the judgment and without making the findings a part of the judgment proper. 23 Cyc. 670; *Hopkins v. Warner*, 109 Cal. 133 (41 Pac. 868); *Pier v. Prouty*, 67 Wis.

218 (30 N. W. 232); *Morgan v. Eggers*, 127 U. S. 63 (8 Sup. Ct. 1041, 32 L. Ed. 56).

A finding of fact does not constitute a conviction. There must be also the judgment of the court. *Blaufus v. People*, 69 N. Y. 107 (25 Am. Rep. 148).

Other matters are discussed by plaintiffs, but our conclusion on the first branch of the case renders their consideration unnecessary. For the reasons given in the second division hereof, the judgment must be *Affirmed*!

LEWIS S. HUNTER v. NORTHERN IOWA BRICK & TILE Co.,
Appellant.

Master and servant: RULES OF EMPLOYMENT: NEGLIGENCE. A mere
1 custom adopted by employees for their own safety, though known to the employer, will not as a matter of law relieve the master of the duty of establishing a system of carrying on the work, which will with reasonable certainty avoid injury to the workmen from the operation of machinery with which they are engaged. Under the evidence in the instant case it is *held*, that the question of whether the custom of signaling the starting of the engine in an adjoining room, as adopted by employees, was the equivalent of such a system of warning as the defendant should have provided, was for the jury.

Same: ASSUMPTION OF RISK. One engaged in the repair of ma-
2 chinery may assume that a proper system of warning employees of the starting and stopping of the machinery by a co-employee has been established and will be enforced; and if unaware of the master's failure to provide such a system he may assume that the system adopted by an employee charged with the operation of the machinery was known to and adopted by the employer; and he need not inquire into the sufficiency of the system for his safety, or whether it had been recognized by the employer as an essential condition under which the work should be done; and the question of assumption of risk is for the jury, unless the evidence is such that the injured party, as a reasonably prudent person, must have appreciated the danger involved.

Same: CONTRIBUTORY NEGLIGENCE. The question of plaintiff's con-
3 tributory negligence in working about a pulley without a plat-
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form on which to stand, and under circumstances requiring him to maintain his position by holding onto a support, and thus working under the assumption that the machinery would not be started without warning, was for the jury.

Appeal from Cerro Gordo District Court.—HON. J. J. CLARK, Judge.

WEDNESDAY, JUNE 5, 1912.

ACTION to recover damages for personal injuries received by plaintiff while in defendant's employment, and alleged to have been due to defendant's negligence. There was a verdict for plaintiff, and from judgment on this verdict the defendant appeals.—*Affirmed.*

Blythe, Markley, Rule & Smith and Cliggitt, Rube & Smith, for appellant.

Wade, Dutcher & Davis and T. G. McDermott, for appellee.

McCLAIN, C. J.—The defendant corporation was, at the time of the accident hereinafter described, engaged in operating a plant for the manufacture of brick and tile. The machine room in which the accident happened was more than one hundred and fifty feet long north and south, about fifty-five feet wide, and twenty-seven feet from the ground floor to the girders of the roof. In this room were two machines used in grinding clay, situated on the ground floor and operated by shafting connected by means of belts with a power shaft, which was in turn connected by a main belt with the engine in an adjoining room to the west. The engine room was entirely separated from the machine room by a wall of hollow tile, through which there was an opening for the main belt to pass. The operation of the machines, as to their starting and stopping, was in charge

of one Wright, an employee; while the engine in the adjoining room was in charge of an engineer, who started and stopped the engine on signals from Wright, given by means of a wire attached to a gong in the engine room. Either of the two machines could be disconnected from the power shaft by throwing off the belt from the pulley. Plaintiff was, and had been for several months prior to the accident, in the employ of the defendant as machinist and blacksmith; his business being to make repairs on any of the machinery. He was experienced in his work. The evidence for the plaintiff tended to show that on the morning of the accident and before seven o'clock, which was the usual time for starting the machinery, plaintiff was advised by one Smith, who was the superintendent, that the north machine was not in condition for use, and that the south machine would be started as soon as plaintiff could put it into condition for starting; that plaintiff, in oiling the south machine preparatory to its being started, found the hard oil cup connected with the north end of the shaft of the machine to be broken off, and went to the shop, and, having fixed the broken pipe of the oil cup, so that he could again screw it into place, went back with his tools to the machine, and, climbing up at its north end on the wooden trestlework which supported the shaft, and holding to the large pulley, which was at that end of the shaft, attempted to replace the oil cup, and while he was so engaged the machine was caused to start, with the result that his right arm was caught between the belt and the pulley and torn off above the elbow. The evidence also tends to show that Wright, with the assistance of other employees, and without plaintiff's knowledge, had placed the power belt on the pulley of the machine at which plaintiff was working, and by a signal to the engineer in the engine room had caused the machine to be started.

1. Several grounds of negligence of the defendant were alleged for plaintiff, but of these the court submitted

to the jury only two, which were, first, alleged negligence in not providing for plaintiff a safe place in which to work; and, second, in not having an adequate system or method of signals and warnings to employees of the starting of the machinery about which they should be employed. With reference to these two grounds of negligence, the jury was instructed as follows:

I. MASTER AND
SERVANT:
rules of
employment:
negligence.

The place where the plaintiff performed his duties must be regarded as a safe place, so far as he had any right to demand or require of defendant, unless you find he has proved it was rendered unsafe by reason of the lack of system or means of signals and warnings, or lack of instructions to plaintiff and other employees as to dangers of the work to be avoided, not known to, or should not have been known with due care, or appreciated by them, and in failing to exercise due care and supervision over said machinery and employees of said plant to enforce obedience to said rules, and thereby prevent said machinery being started while plaintiff was in a dangerous position.

The court also instructed the jury as follows:

While I have withdrawn from you as grounds of negligence of defendant the question of platform and of light, yet you are instructed that the character of the place with reference to the structure and the lights may be considered by you in determining the question of contributory negligence, and in determining the question of the reasonableness or sufficiency of rules, as explained.

And with regard to rules and regulations, this further instruction was given:

In determining the question submitted pertaining to the requirement of the master that he shall furnish rules, regulations, or system in the conduct of the business, you are instructed that the character of such rules, regulations, or system should be reasonable, in view of the duties to be performed by the employees and the nature and character of the place furnished by the master in which the employee is required to perform such duty or duties.

The general complaint of appellant with reference to these instructions is that they require fixed and formal rules and methods as to the giving of signals; that it was shown by the evidence, without conflict, that there was a sufficient system of signals in force, by custom, to plaintiff's knowledge, rendering any formal rules unnecessary; and that if Wright was negligent in failing to give the signal required by such custom his negligence was that of a fellow servant, for which the defendant was not liable, so far as the injury to plaintiff resulted from such failure.

There is evidence tending to show that the signal to the engineer to start his engine was given by two taps on the gong in the engine room, as above described; that the sounding of the gong by means of an automatic hammer, released by a pull of the wire from the machine room, could be heard throughout the machine room by the employees engaged therein; and that it was also the custom of Wright, before sounding the bell for the starting of the engine, to call a warning by such words as: "Look out; the engine is going to start." But, under the evidence and the instructions, it was for the jury to say whether the custom with reference to the giving of signals constituted a system of conducting the business for the purpose of affording warning to employees as to dangers of the work, and whether the warning thus afforded was reasonably sufficient under the circumstances under which the work was carried on.

It may be conceded, for the purposes of this case, that a general custom to give warnings, which is known to the employees and recognized by them as giving rise to a duty on their part to the employer and to their fellow workmen to conform to its requirements, may be sufficient as constituting a system of warning and protection, although not embodied in formal rules or directions, either written or oral. But, under the evidence in this case, it was a question of fact whether the custom or the usage of the em-

ployees was such as to constitute a system of warning equivalent to such as should have been provided by the defendant. So far as the evidence indicated, defendant had never given any direction that there should be a warning of the starting of the engine, other than that afforded by the sounding of the gong. It is not contended that Wright had ever been directed to give an oral warning, or that his customarily doing so was the result of any plan or system on the part of the defendant. He was not a superintendent, whose adoption of a plan could be regarded as the act of the defendant, and this is vital in the case; for, under the theory adopted by the trial court in its instructions, which became the law of the case, his failure in this instance to call out a warning (which his testimony tended to establish, although there was a conflict as to the fact under the evidence) was the negligence of a co-employee for which defendant was not responsible. It is quite clear, we think, that, to constitute such a system of warning as was the duty of the defendant to establish and enforce, something more was necessary than the mere usage on the part of one co-employee, initiated, so far as appears from the record, in accordance with his own judgment, even though it may have been known to the employer, to give such a warning, in order to render the place in which the work was carried on a safe place in which to work. A mere custom or practice adopted by employees for their own safety necessarily lacks the importance or force of a rule promulgated by the employer for the protection of its employees; and whether a definite rule should have been promulgated or a more adequate system adopted was necessarily a question for the jury. *McCoy v. New York C. & H. R. R. Co.*, 185 N. Y. 276 (77 N. E. 1174); *Hartvig v. N. P. I. Co.*, 19 Or. 522 (25 Pac. 358); *Abel v. Delaware & H. C. Co.*, 103 N. Y. 581 (9 N. E. 325, 57 Am. Rep. 773).

Authorities are cited for the appellant to support the

proposition that, where there is a custom or practice in force among employees which is adequate and renders a formal rule unnecessary, a failure to promulgate a formal rule will not constitute negligence. See *Kudik v. Lehigh Valley R. Co.*, 78 Hun 492 (29 N. Y. Supp. 533); *Luebke v. Chicago, M. & St. P. R. R. Co.*, 63 Wis. 91 (23 N. W. 136, 53 Am. Rep., 266); *Campbell v. Texas & P. R. Co.*, 16 Texas Civ. App. 665 (39 S. W. 1105); *Rutledge v. Missouri Pacific R. Co.*, 123 Mo. 121 (24 S. W. 1053, 27 S. W. 327); *Barto v. Detroit Iron, etc., Co.*, 155 Mich. 94 (118 N. W. 738). But these cases fall far short of establishing the proposition contended for in behalf of appellant, that the custom indicated by the evidence in this case, as matter of law, constituted a sufficient and adequate substitute for some rule or regulation or system of carrying on the work reasonably calculated to avoid injury to the employee working about defendant's machinery likely to result to him from the starting of the machinery without warning to him.

Although the evidence established, without controversy, the fact that a gong was installed in the engine room, which was to be struck, by means of a wire connected with the machinery room, before the engine should be started, and that the sound of such gong could usually be heard in the machinery room, there was still a question for the jury whether the method of warning thus provided was reasonably adequate; and its inadequacy might have been found by the jury as a matter of fact, in view of the evidence tending to show that the sound was not calculated to attract the attention of all the workmen engaged in the large machinery room wholly separated by a wall from the engine room; and that the duty of the engineer was to start his engine immediately upon the sounding of the gong, without allowing any time to elapse during which the employees should have opportunity to place themselves in positions of safety. The fact that the gong was to be twice rung be-

fore the engine should be started is of no significance in this connection, for two strokes of the gong constituted the signal for starting the engine, while one stroke was the signal for stopping it; and it is evident, therefore, that the system of signaling adopted involved only two quick strokes, without any appreciable interval of time. It is not contended that the system adopted was first to give a warning stroke and then a second stroke, on which the engine was started. The undisputed facts in the case were such as to make it clear, therefore, that the jury might reasonably find the system of warning to be insufficient.

While plaintiff was working about a pulley carrying a belt, and necessarily supporting himself in a somewhat precarious position by holding onto the pulley with one hand as he adjusted the oil cup with the other, having no platform on which to stand and no railing or handhold provided to which he could cling, the machinery was set in motion by two taps on an eight-inch gong in an adjoining room, and his arm was caught between the belt and pulley, when the machinery started. Unless he had assumed the risk of such a method of operation of the machinery, or was guilty of contributory negligence in placing himself in such position of danger, the jury might well find that defendant was liable under the evidence tending to show that, in view of the dangers generally surrounding his employment as machinist, and the special danger involved in the failure to provide a platform on which to more securely stand while engaged in this particular work, the defendant had failed to furnish a reasonably safe place for the plaintiff to carry on the work originally intrusted to him.

It is said that, although the alleged negligence in failing to furnish a platform on which plaintiff might safely perform this particular work, and to adequately light the place where he was at work, were withdrawn from the

jury as independent grounds of negligence, they were in fact reincorporated in the grounds of negligence submitted to the jury by the instruction authorizing them to be considered in determining the question of sufficiency of rules. But there was plainly no error in the instruction in this respect; for the rules, regulations, and system in regard to warning should have been reasonably adapted to the situation of plaintiff as he was working in the proper discharge of his duty, and, if he was so working as that warning was essential to his safety, then a failure to provide for it would constitute negligence.

II. In regard to assumption of risk, the argument for appellant is that, in view of plaintiff's knowledge of the method in which the work was usually conducted, he

2. SAME:
assumption
of risk. must necessarily have assumed the risk involved in any failure to provide a reasonable system for giving warning of danger. But it does not appear that he was aware of defendant's failure to provide and generally enforce the observance of such a reasonable system. He may well have assumed that the system adopted and enforced by the defendant involved an oral warning by Wright before the machinery would be started; and, as already indicated, the jury may well have found that no such warning was required by any direction of defendant, or by any general custom recognized by defendant and its employees as the proper and safe method in which to conduct the work. He was not bound to make inquiry in regard to the sufficiency of the rules and regulations in this respect, nor to find out whether the usage which he had observed on the part of Wright to call out before the machinery was started was recognized by the defendant and its employees as an essential condition under which the work should be carried on. He had a right to assume that proper methods of doing the work on the part of his co-employees were required and insisted upon by

the defendant. *Polaski v. Pittsburgh Coal Dock Co.*, 134 Wis. 259 (114 N. W. 437, 14 L. R. A. (N. S.) 952).

The general rule that assumption of the risk is a question for the jury, unless the evidence shows, without dispute, that the injured party should, as a reasonably prudent person, have appreciated the danger involved, is too well settled in the decisions of this court to justify a citation of cases.

III. No complaint is made in regard to the instructions as to contributory negligence; and it was for the jury to say whether, in view of the situation under which plaintiff was required to work about the pulley, without a platform on which to stand, and under circumstances requiring him to keep himself in place by holding to some support, under the assumption that the machinery would not be started without warning, he was negligent in thus supporting himself by taking hold of the pulley, rather than by holding to an adjoining timber. It would be difficult to explain from the record just how the plaintiff might have adequately held himself in place without being in danger of injury from the sudden starting of the machinery; and this very difficulty is sufficient to warrant the conclusion that the question of contributory negligence in this respect was one of fact. The question of lighting was, in this respect, also material; and we can not say, as matter of law, that plaintiff was negligent in not proceeding otherwise than as he did proceed in performing his work.

After a careful consideration of all the questions presented in appellant's argument, we reach the conclusion that no error on the part of the trial court is made to appear; and the judgment is—*Affirmed*.

**GLOBE MACHINERY & SUPPLY COMPANY, Appellant, v. CITY
OF DES MOINES.**

Municipal corporations: VIADUCTS: ASSESSMENT OF DAMAGES: COSTS.

1 The costs occasioned by the assessment of damages to abutting property for the construction of viaducts, including a reasonable attorney's fee, with those incurred by an appeal, are taxable against the city, if the damages are increased on the appeal.

Same: APPEAL: WAIVER OF RIGHT OF RECOVERY. The acceptance by a
2 property owner of a part of the damages assessed, over which there is no controversy on appeal, will not waive the appeal as to a right to recover those matters which are controverted.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

THURSDAY, JUNE 6, 1912.

THE defendant city, having proceeded in a proper manner to provide for the construction of a viaduct in one of its streets over the tracks of certain railway companies, which viaduct was to be constructed at the expense of such companies, caused proceedings to be instituted for appraising, assessing, and determining the damages caused to property abutting on the street by reason of the construction of such viaduct and its approaches. See Code, sections 770-774, as amended by subsequent statutes embodied in Code Supp., sections 771-774. In this proceeding, there was an assessment by commissioners appointed by the sheriff of the damages to plaintiff's property, which abutted upon the portion of the street in which the viaduct and its approaches were to be constructed. From this assessment, the plaintiff appealed to the district court in the manner provided in Code, sections 2009-2012, for appeals

in proceedings involving the taking of private property for public use, and as the result of this appeal the amount to be paid to the plaintiff was largely increased. Thereupon plaintiff moved to have the lower court tax against defendant and in favor of plaintiff's attorneys the reasonable attorney's fees of plaintiff on such appeal. This motion was overruled, and the court directed that the costs of the assessment and of the appeal, not including any allowance for attorney's fees, be taxed to the defendant. From the order disallowing attorney's fees as a portion of the costs, the plaintiff appeals.—*Reversed.*

Read & Read, for appellant.

R. O. Brennan, H. W. Byers, and Eskil Carlson, for appellee.

McCLAIN, C. J.—The statutory provisions as to taking of private property for public use, which includes Code, section 2007, relating to attorney's fees in favor of the person whose property is sought to be condemned, evidently have no application to the assessment of damages to an abutting property owner resulting from the construction of a viaduct in a public street of a city, unless, in the statutes relating to viaducts, they are incorporated by reference. Furthermore, it is plain that, even though the construction of such viaduct may be a change of grade of the street for which the city would be liable, under the provisions of Code, section 785, to an abutting property owner, who has improved his property in reliance on a previously existing grade, the Legislature has authorized a different method of procedure in regard to the assessment of damages for the construction of a viaduct from that provided in case of a change of grade; for, by Code, section 786, the amount of damages for change of grade is to be determined by commissioners selected by the mayor and the property owner,

who are to report their appraisalment to the city council, which may confirm or annul the appraisalment in its discretion, a right of appeal from the action of the council confirming the assessment to the district court being provided for (see Code, sections 786-790); while, in regard to viaducts, it is provided that the proceedings for assessing the damages to abutting property owners "shall be the same as in case of taking private property for works of internal improvement." Code, Supp. section 771. The defendant city did proceed in accordance with the method prescribed for assessing damages in case of taking private property for works of internal improvement; and it must be conceded that, having pursued this method, the defendant was bound to pay the costs of the assessment and those occasioned by the appeal out of the funds designated in Code Supp., section 771-a.

The only question now before us is whether the costs of the assessment and those occasioned by the appeal include reasonable attorney's fees, as provided in Code, section 2007; that is to say, the question now is whether, having incorporated into the viaduct statute a provision that the proceedings shall be the same as are provided in case of taking private property for works of internal improvement, such incorporation by reference covers the provision as to including as a part of the costs the attorney's fees of the property owner in whose favor an assessment is made.

We think there can be but one reasonable answer to this question. There is no provision whatever in the viaduct statute for the payment of costs of the assessment or of the appeal, save by reference to the statute relating to the taking of property for works of internal improvement. Indeed, there is no provision for an appeal from the assessment, save by reference to the general condemnation statute, above referred to. When the defendant elected to proceed under the condemnation statute to have assessed the dam-

1. MUNICIPAL
CORPORATIONS:
viaducts:
assessment
of damages:
costs.

ages to abutting property owners, it became bound to pay out of the funds specified in the viaduct statute the damages and costs which are contemplated by the condemnation statute; for the costs of the proceedings are necessarily incidental to the assessment of the damages. To ascertain what costs should be paid as incidental to the assessment and the appeal, we must look to the condemnation statute, which, as already indicated, specifically provides that the costs of the assessment shall include reasonable attorney's fees on appeal, unless on the trial of the appeal there is no increase in the amount of damages awarded.

This conclusion is in accordance with the views of the court expressed in *Mellichar v. Iowa City*, 116 Iowa, 390, in which it was held that proceedings by a city for condemnation of land for municipal purposes, being directed to be "in accordance with the provisions relating to taking private property for works of internal improvement," involved liability on the part of the city for the costs of the assessment and of the appeal, including attorney's fees, if the damages on appeal were increased. Of course, neither the costs nor attorney's fees are to be taxed in a special proceeding of this character, unless the statute so provides; but, having by reference incorporated into the viaduct statute the provisions relating to assessment of damages found in the condemnation statute, the provisions of the latter as to costs are necessarily incorporated by the same reference, and, if the provision as to costs is thus included, then necessarily the provision as to including attorney's fees on appeal as a part of the costs is also incorporated.

In *Jones v. School Board*, 140 Iowa, 179, the court had under consideration the provision found in Code, section 2815, relating to condemnation of schoolhouse sites by a school district. That section provides a procedure for the assessment of damages in such cases quite different from the procedure provided in the statute relating to the taking of private property for works of internal improve-

ment; the only reference to the latter being that an appeal from the assessment may be taken "by giving notice thereof as in case of taking private property for works of internal improvement." Plainly the reference here made does not incorporate by reference the provisions of the condemnation statute referring to assessment of damages, as to costs, nor as to attorney's fees, but only such provisions as relate to the giving of notice; and the court therefore held that, under Code, section 2815, the provisions of Code, section 2007, relating to costs and attorney's fees, and having no reference whatever to notice of appeal, were not incorporated by such reference.

Further discussion is not necessary in support of our conclusion that the trial court erred in this case in holding that attorney's fees should not be included in determining the costs of the appeal.

It is contended for appellant that, as the plaintiff has accepted the amount of damages allowed on appeal, it is now barred from maintaining this appeal with reference to the disallowance of attorney's fees. But **2. SAME: appeal:** it is well settled that the acceptance of the **waiver of right of recovery.** amount of the judgment, about which there is no controversy on the appeal, does not waive the appeal as to a right of recovery which is in controversy. *Funk v. Mercantile Trust Co.*, 89 Iowa, 264; *Byram v. Polk County*, 76 Iowa, 75; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557.

The ruling of the trial court disallowing attorney's fees on appeal as a portion of the costs is therefore—*Reversed.*

T. W. BARHYDT, Appellee, v. W. C. CROSS ET AL., Appellants.

Taxation: CANCELLATION OF ASSESSMENT: BURDEN OF PROOF. A taxpayer claiming that he was not possessed of property with which he was assessed is charged with the burden of proving that fact;

and in the absence of any evidence from him on the subject the court is not justified in cancelling the assessment on the ground that defendant offered no evidence that he had such property for taxation.

Same: OBJECTIONS TO ASSESSMENT: WAIVER. A taxpayer can not
2 question on appeal the form of an assessment made by a board of review, where he failed to raise that question before the board.

Same: RESIDENCE: EVIDENCE. For the purpose of taxation a person
3 must have a domicile or residence somewhere, and his old residence will be deemed his present one until a new one has been acquired. In the instant case the plaintiff and his wife lived continuously at one place in this state for many years, and while living there they left for a trip around the world, leaving the house furnished and in the possession of a caretaker. *Held*, that that was his place of residence for the purpose of taxation during his trip abroad, even though he may have intended removing to another state upon their return to this country, and in fact did purchase property and make their residence in such other state upon their return.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTHE, Judge.

THURSDAY, JUNE 6, 1912.

APPEAL from a decree of the district court canceling an assessment against plaintiff, Barhydt, of \$250,000 on moneys and credits for the year 1910.—*Reversed*.

Poor & Poor, for appellant.

Blake & Wilson, for appellee.

DEEMER, J.—The facts are not in dispute. We quote from appellant's brief such as are deemed controlling.

Prior to October 8, 1909, T. W. Barhydt resided at No. 420 Iowa street, in the city of Burlington, Iowa; the same being an eleven-room brick house, with brick laundry and barn, on a lot 180 x 117 feet, where he had lived con-

tinuously for over forty years. On October 8, 1909, while still living in that house, he and his wife started on a trip of travel, study, information, and sightseeing around the world via New York, the Suez Canal, Egypt, India, China, Japan, and Hawaii; the destination being San Francisco, Cal. He left his furnished home at Burlington in charge of a caretaker. After leaving New York, the only place where they were in territory controlled by the United States before reaching their destination was at Manila, Philippine Islands, on December 19, 20, and 21, 1909, and at Honolulu January 23 and 24, 1910. They reached San Francisco, Cal., on January 31, 1910, where their water trip ended; and, after resting a few days there, they went direct to Los Angeles and Pasadena, Los Angeles county, Cal., spending part of the time in each place, while Mr. Barhydt looked over different properties he had in view to purchase, first purchasing No. 90 South Grand avenue, Pasadena, late in March. At the same time, he had made an offer on No. 969 San Pasqual street, Pasadena, which was accepted within a few days, both of which properties he owns now. Mr. Barhydt remained in Pasadena until April 15th, when he and his wife returned to Burlington, and such portions of the summer as they were in that city occupied No. 420 Iowa street, their old home, and lived there until December 20, 1910. At the date of the trial below, March 7, 1911, his house and furniture in Burlington were in charge of a caretaker. Prior to this trip around the world, they were accustomed to spend most of their winters in Burlington, taking occasional trips, but never going away before February or March.

At the time of taking Mr. Barhydt's deposition (January 30, 1911), he was living at No. 969 San Pasqual street, Pasadena, Cal., having occupied that house since December 23, 1910, the house having been purchased in March, 1910; and Mr. Barhydt took possession of the same by placing a caretaker in charge of it on April 22,

1910. Mr. Barhydt testified that he left Iowa, with the purpose and intention of ceasing to have a residence and domicile there, on October 8, 1909. Previous to leaving Burlington, he said he looked up several places in California in view of becoming a resident and citizen of that state.

An assessment was made against Barhydt by the assessor for the year 1910 of two dogs, one horse, three vehicles, and household furniture amounting of \$1,000, and on this assessment roll was a statement that Barhydt lived at Pasadena, Cal. And also the following statement: "I own twenty shares of Merch. Nat. Bank stock, and demand that my indebtedness be deducted from value of personal property." On this roll Barhydt also listed his debts, which he claimed amounted to \$47,741. This roll was made out for Mr. Barhydt by his attorney, and was returned by the assessor to the board of review.

When the matter reached the board of review, it changed the assessment, as follows: "(11) Moneys and credits raised from nothing to \$250,000. Household furniture raised from nothing to \$2,000." The \$2,000 is scratched out, and written below said \$2,000 are the figures "\$1,000"; such change being made in red ink.

Against this change the plaintiff filed the following protest with the board: "To the Board of Review of the City of Burlington, Iowa—Gentlemen: I, T. W. Barhydt, protest against the assessment made by this board of review reported as follows: 'Moneys and credits raised from nothing to \$250,000. Household furniture raised from nothing to \$2,000.' (1) This board is without legal jurisdiction or authority to make said assessment. (2) T. W. Barhydt is not a resident of the state of Iowa, and was not on the 1st day of January, 1910, nor at any time since October 8, 1909. (3) T. W. Barhydt, on January 1, 1910, had no moneys and credits taxable in this jurisdiction under the laws of the state of Iowa. (See affidavit attached.)

As to household furniture: (1) The return of Mr. Barhydt of household furniture at \$1,000 is fair and equitable, and is the full value of his household furniture subject to taxation. (See affidavit attached.) Wherefore you are respectfully asked to cancel said proposed change."

This was supported by an affidavit of Barhydt made on the 22d day of April, 1910, in which he said:

I am not now, and I was not on the 1st day of January, 1910, nor at any time since said date, a resident of the state of Iowa; that I removed from the state of Iowa to the state of California, leaving Iowa on the 8th day of October, 1909, and at no time since said date have I been, nor am I now, a resident of the state of Iowa, but am a resident of the state of California. My removal from the state of Iowa was in good faith; and I have no purpose of again becoming a citizen or resident of Iowa. I further state that on the 1st day of January, 1910, I was not the owner of moneys and credits, subject to taxation in Iowa, aside from national bank stocks and savings bank stocks, said bank stocks all being taxable only at the place of the location of the bank, and all being paid by said banks; nor did I have in my possession, nor did I own, any moneys and credits in any sum issued by any Iowa corporation or other Iowa resident, or in any manner secured by Iowa property, save and except two mortgages, one for \$3,000 and one for \$1,000, and on said January 1, 1910, I was indebted, as stated in my original return, in excess of the sum of \$47,000, more than one-half of which indebtedness was due and owing to Iowa creditors. As to household furniture, I have paid taxes on household furniture at a valuation of something like \$1,000 for very many years. My taxable household furniture is very old and worn, and its taxable value does not exceed the sum which I returned, to wit, \$1,000. And further deponent sayeth not.

This protest was unavailing, and plaintiff appealed to the district court, and upon trial there the assessment on moneys and credits in the sum of \$250,000 was canceled. Plaintiff at that trial introduced no testimony showing, or tending to show, that he did not have the amount of moneys

and credits with which he was assessed. On the contrary, his testimony was directed wholly to the issue as to his residence on January 1, 1910.

The appeal for and on behalf of the defendants challenges the ruling of the trial court in canceling the assessment on moneys and credits. As no testimony was adduced

by plaintiff showing that he was not pos-
 1. TAXATION:
 cancellation of
 assessment:
 burden of
 proof.

sessed of the amount of moneys and credits with which he was assessed, the finding of the trial court can not be sustained on the theory that defendants offered no evidence that he had such property subject to taxation. *King v. Parker*, 73 Iowa, 757.

II. In support of the court ruling, it is contended that the assessment made by the board of review can not be sustained, because it was upon moneys and credits, with-

out specification as to items. The exact
 2. SAME:
 objections to
 assessment:
 waiver.

point here is that the board acts simply as and for the assessor; and that, as it was the duty of the assessor to list the kind and character of items under the head of moneys and credits, as, notes, bonds, money in bank, book accounts, etc., so it was the duty of the board to do likewise; and that its assessment of "Moneys and credits raised from nothing to \$250,000" is irregular and illegal, and should be set aside. The statute provides for such a listing by the assessor (see Code Supp., section 1360), with forms there given. But this seems to be largely for convenience, in order that it might be deducted from the net amount as brought forward onto the roll in another place. There is no provision of this kind with reference to the action of the board of review. Without passing upon the necessity for such a course, it is enough for the present to say that in making his protest before the board of review plaintiff made no such claim as is now insisted upon. We have fully set forth all the specifications contained in that protest; and none of them, as it seems to us, covers the matters now under consideration. That plaintiff is con-

finer to the objections there made is elementary. *Brown v. Grand Junction*, 75 Iowa, 489; *Railway Co. v. Cedar Rapids*, 106 Iowa, 477; *Gibson v. Cooley*, 129 Iowa, 529; *Farmers' Bank v. Fonda*, 114 Iowa, 728.

By no stretch of the imagination can it be said that the question as to the validity of the schedule was made before the board. It is quite important that such objection be made before the board, in order that it may make a correction at the time, and thus require of the taxpayer that he bear his just proportion of the burdens. Unless so made, he should ever after hold his peace, and not be allowed to question the form of the assessment.

III. But a single question is left, and that the primary one: Was Barhydt domiciled at Burlington on January 1, 1910, or had he such a residence there as subjected his property to taxation in that district?

3. SAME:
residence:
evidence.

It is perfectly manifest that that was his home until he started on his trip around the world, and that he did not gain a residence or domicile at any other place until after the 1st of January, 1910. Although on the ocean on January 1st, he had a residence or domicile somewhere; for he could not fully expatriate himself. Had he died on his journey, or gone down with his ship, as so many brave men have recently done, there could be no question as to his domicile. His will, if he had made one, would undoubtedly have been probated at Burlington; and his estate, if he left no will, would have been administered by the courts of this state, and in Des Moines county. As Barhydt must have had a residence and domicile somewhere, it is for the courts to decide where that was, under the record now presented. Residence and domicile have no uniform meaning in law; and when it becomes necessary to interpret them much depends upon the nature of the action.

Cases of abandonment of residence, as applied to homesteads, or as to residence, where it is not essential that

one have a homestead at all, or a definite residence, for the purposes of the case, are not applicable to such controversies as this, where a man must have a residence or domicile somewhere. Courts endeavor to construe revenue laws so that each one will share his just burden of taxation; and he should pay his taxes somewhere. Hence it is the universal rule, in construing revenue statutes, that, as a man must have a domicile or taxing residence somewhere, his old residence will be deemed his present one until a new one is acquired. If this were not the rule, a man might escape taxation altogether. Assuming, for the purposes of argument, as we must, that the laws of California are the same as our own, Barhydt would escape all taxation for the year 1910, were he successful in this appeal; for he could not, under the record, be taxed in California. Our own cases, with possibly one exception, sustain this view, and, as we shall see, this is the holding elsewhere. Of our own cases supporting the conclusion here reached, see *Tuttle v. Wood*, 115 Iowa, 509; *Glotsfelty v. Brown*, 148 Iowa, 124; *In re Titterington*, 130 Iowa, 358; *Nugent v. Bates*, 51 Iowa, 79; *Cover v. Hatten*, 136 Iowa, 65.

In *Cover's* case, it is said:

Where one acquires a residence, that residence is presumed to continue until he acquires another; and the burden is upon him to show a change and the acquisition of a new residence. This change, for the purpose of taxation, must be something more than a mere intent. It involves a change of place as well. In other words, the mere intent of the plaintiff, no matter how expressed, will not constitute a change, unless there be a change in abode as well.

In *Titterington's* case, we said:

A man must have a domicile somewhere. He can not have two at the same time; and a domicile once gained remains until a new one is acquired. Two things must concur to effect a change of domicile. There must be actual residence and the intent.

In *Tuttle's* case, this was said:

The change (of domicile) can not be made except *facto et animo*. Both are alike necessary. Either, without the other, is insufficient. Mere absence from a fixed home, however long continued, can not work the change. There must be *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains.

The other cases use like expressions; and the only discordant note is found in *Ludlow v. Szold*, 90 Iowa, 175, relied upon by appellee. That decision was by a divided court, however; and the question involved was not one of taxation. In so far as any of the language used is at variance with that used in the taxation cases since decided, and to which we have made reference, it must be regarded disapproved. For purposes of taxation, the word "residence," as used in our statutes, means "domicile." *Barber v. Farr*, 54 Iowa, 57; *Gilbertson v. Oliver*, 129 Iowa, 568; *Gloftelty v. Brown*, 148 Iowa, 124.

We make this reference for the purpose of showing the applicability of cases from other jurisdictions which support the rule we have adopted. Thus, in *Borland v. Boston*, 132 Mass. 89 (42 Am. Rep. 424): "One domiciled in Boston, Mass., went to Europe in 1876 with his family, for an indefinite term of absence, and remained abroad until 1879. On leaving, he had determined never to return to reside in Boston, and before May 1, 1877, he had decided to take up his residence, on his return, in Waterford, Conn.; and on his return he went there to reside. Held, that his 'domicile,' for the purposes of taxation, was in Boston on the 1st of May, 1877."

In the opinion, it is said:

Upon the whole, therefore, we can have no doubt that the word 'inhabitant,' as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means 'one domiciled.' While there must be inherent difficulties in the decisiveness of proofs of domicile, the test itself is a certain one; and, inasmuch as every person, by universal accord, must have a domicile,

either of birth or acquired, and can have but one, in the present state of society, it would seem that not only would less wrong be done, but less inconvenience would be experienced, by making domicile the test of liability to taxation, than by the attempt to fix some other necessarily more doubtful criterion. . . . The plaintiff does not bring himself within this rule; for, although he might have left the commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain, which he had determined upon as his future residence, and was proceeding with due despatch; and upon the general rule that, having had a domicile in this commonwealth, he remains an inhabitant, for the purpose of taxation, until he has acquired a new domicile, the intention and fact had not concurred at the time when this tax was assessed.

See, also, *Bulkley v. Williamstown*, 3 Gray (Mass.) 493. The court there said:

The general rule, and, for practical purposes, a fixed rule, is that a man must have a habitation somewhere; he can have but one; and therefore, in order to lose one, he must acquire another. This is the test, the practical test; and it is hardly necessary to say how important it is to have a practical rule, and a general rule. One of the fixed rules on the subject is this: That a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove, without the intention of going back. The question here is whether he can abandon one, without acquiring another; and we think it has always been held that he can not. If he goes into another state, and returns for his family, his personal presence there, concurring with the intent, may fix his domicile there. But if he has not previously removed to the other state, he has not acquired a domicile there, or lost one here.

This case followed *Kilburn v. Bennett*, 3 Metc. (Mass.) 199, to which reference is made. These cases are closely related and seem to rule the one now before us. In addition to that, they support all our later cases.

See, also, *Kellogg v. Supervisors*, 42 Wis. 97, wherein it is said:

For the purpose of taxation and the discharge of those duties which every person owes to society and the government that protects him, a person can not be without a residence or domicile, so that, if he quits a place with intent to take up his residence or domicile in another, he may, while in *transitu*, have no domicile; 'but the more correct principle would seem to be that the original domicile is not gone until a new one has been actually acquired *facto et animo*.' Story on Conflict of Laws, section 47. We used the words 'residence' and 'domicile' interchangeably as synonymous terms under our statute. *Hall v. Hall*, 25 Wis. 600. And, in the language of Shaw, C. J., we say: 'The general rule, and, for practical purposes, a fixed rule, is that a man must have a habitation somewhere; he can have but one; and therefore, in order to lose one, he must acquire another. This is the test, the practical test; and it is hardly necessary to say how important it is to have a practical rule, and a general rule. One of the fixed rules on the subject is this: That a purpose to change, unaccompanied by an actual removal or change of residence, does not constitute a change of domicile.'

The following also support the rule we have adopted: *Littlefield v. Inhabitants of Brooks*, 50 Me. 475; *Schmoll v. Schenck*, 40 Ind. App. 581 (82 N. E. 805), and the many cases cited. Indeed, there seems to be no discordant note in the cases, in so far as they relate to the subject of taxation.

On the 1st day of January, 1910, Barhydt was domiciled in Burlington, Iowa; and that was the place of his residence for the purposes of taxation. He had not, by the widest stretch of imagination, become a resident of California, and at that time had not determined for himself where his residence would be in that state after his arrival there.

The district court was in error in canceling the assessment, and its judgment must be, and it is—*Reversed*.

In re Awarding the County Printing, and the Selection of Official Newspapers of Cherokee County. THE CHEROKEE TIMES and THOMAS McCULLA, Appellant, v. THE CHEROKEE REPUBLICAN and JOHN T. HOGAN, Appellee.

Municipal corporations: COUNTY PRINTING: PROCEDURE. In contests
1 over the selection of county newspapers, and the awarding of county printing, the protests and pleadings should not be construed with too much strictness; as the proceedings are largely informal in character, before a board not accustomed to judicial procedure, and usually conducted by the contending owners of the newspapers.

Same: APPEAL: SERVICE OF NOTICE. An appeal from the action of
2 the supervisors in designating official county newspapers is to be taken as in ordinary actions, by service of notice upon the publisher against whom the protest has been lodged; it need not be served upon any county official.

Same: TRIAL: DEPOSITIONS: WAIVER OF ERROR. An appeal from an
3 order of the supervisors designating official county newspapers is a special proceedings; and, while not triable to a jury, is to be heard as an ordinary action, and the court is not authorized to order the case tried upon depositions or other written evidence. And although the appellant may have complied with an unauthorized order requiring the action to be tried on depositions, having excepted to the order, he did not thereby waive the error.

Same: RIGHT TO OFFER ADDITIONAL EVIDENCE. Even though the appel-
4 lant in such a case suffered no prejudice by an erroneous order that the case be tried on depositions, still a refusal to permit him to introduce additional testimony on the trial was erroneous.

Same: APPEAL: PREJUDICE: PRESUMPTION. The rule that when error
5 is once shown, in an action triable on appeal upon the assignments of error, prejudice will be presumed, applies to an appeal from an order designating official newspapers, and a reversal will be ordered unless it is affirmatively shown that no prejudice resulted. And the appellant need not present more of the

record than is sufficient to show the errors complained of. If the appellee claims that the erroneous rulings were not prejudicial he must show that fact.

Appeal from Cherokee District Court.—HON. WM. HUTCHINSON, Judge.

FRIDAY, JUNE 7, 1912.

APPEAL from a decision of the district court in the matter of the selection of county newspapers and the awarding of the county printing to the defendant paper. The case was brought to the district court on appeal from the action of the board of supervisors in awarding the printing to three newspapers published in the county, not including the Cherokee Times, and the action of the board was sustained by the district court. The Cherokee Times and Thomas McCulla appeal.—*Reversed.*

J. A. Miller and McCulla & McCulla, for appellants.

Herrick & Herrick and Molyneux & Maher, for appellees.

DEEMER, J.—At its January session in the year 1910, the board of supervisors of Cherokee county had before it the matter of selection of the official newspapers of the county. Five newspapers made application, to wit, the Cherokee Republican, the Semi-weekly Democrat, the Marcus News, the Times Publishing Company and Thomas McCulla, and one other. After a hearing the board selected the Semiweekly Democrat, the Cherokee Republican, and the Marcus News as the official county papers for the year 1910. The Times Publishing Company and McCulla appealed to the district court. Upon a hearing there, the action of the board was confirmed and sustained, and this appeal followed.

The record is in some confusion, and we shall have some difficulty in stating it. Before the board of supervisors, the Cherokee Times and Thomas McCulla filed application for the county printing, and the Cherokee Republican and John T. Hogan did the same thing. The Cherokee Times and Thomas McCulla filed a protest against the list filed by the Republican, and this protest is introduced in this way: "Thomas McCulla, editor and one of the owners of the Cherokee Weekly Times, appears," etc. This protest was duly filed, but not signed by any one. The Cherokee Republican and Hogan also filed a protest against "the list filed by Thomas McCulla for the Cherokee Times and by the Cherokee Times, and protested against the list of subscribers of said Cherokee Times" for reasons stated. The records of the board of supervisors show that Thomas McCulla appeared and filed protests against list of subscribers filed by the Cherokee Republican and that the Cherokee Republican, by attorney, filed a protest against the list of subscribers submitted by the Cherokee Times, and that at the time set for hearing no specific evidence was submitted, and an award was made as before indicated. The record further shows the following:

That thereafter, to wit, on the 22d day of January, A. D. 1910, the Times Publishing Company and Thos. McCulla, appellants, filed their appeal bond in the sum of \$100, which bond was, on the 25th day of January, A. D. 1910, duly approved by me. That on said 22d day of January, A. D. 1910, the said Times Publishing Company and Thos. McCulla caused to be served on the undersigned, auditor of Cherokee county, an original notice of appeal in this matter, which notice is hereto attached and made a part of this transcript. That afterwards, and on the 22d day of January, A. D. 1910, the said Cherokee Times and Thomas McCulla, appellants, duly served notice of appeal from said proceedings, findings, and judgment of the board of supervisors of Cherokee county, Iowa, in selecting the Cherokee Republican as one of the official newspapers for Cherokee county, Iowa, to the district court of

Cherokee county, Iowa, upon John T. Hogan, owner and proprietor of the Cherokee Republican, appellee, and which said notice of appeal was duly filed in said matter on the 22d day of January, A. D. 1910.

The notice of appeal to the district court was entitled: "Notice of Appeal. In the Matter of Selecting Official Newspapers for the Year 1910 by the Board of Supervisors of Cherokee County, Iowa." It contains the following recitations:

To John T. Hogan, owner of the Cherokee Republican —Sir: You will please take notice that the Times Publishing Company, owners of the Cherokee Semiweekly Times, a newspaper published at Cherokee, Cherokee county, Iowa, and Thomas McCulla, one of the owners and manager of said company, and publisher of the said Cherokee Semiweekly Times, have appealed from the decision of the board of supervisors of Cherokee county, Iowa, made on the 6th day of January, 1910, in naming the Cherokee Republican as one of the official newspapers of said county, for the year 1910, to the district court of the state of Iowa, in and for Cherokee county, and that said appeal will be brought on for further proceedings at the March term of said court, to be begun and holden at the courthouse in said county on the 14th day of March, 1910.

It is signed as follows: "Times Publishing Company, per Thos. McCulla, manager. Thos. McCulla," This notice was served upon John T. Hogan, owner of the Cherokee Republican, and filed by the county auditor, George Wilson, on January 22, 1910.

Transcript of the record before the board was filed with the clerk of the district court of Cherokee county, and on November 1st, on application of the appellee, the trial court made the following order:

And now, to wit, on the 1st day of November, A. D. 1910, the same being one of the term days of the regular October, A. D. 1910, term of the district court of the

state of Iowa, in and for the county of Cherokee, the above-entitled cause coming on for hearing upon the call of calendar, the plaintiff appears by its attorney, J. A. Miller, for Times, and the defendant by attorneys, Molyneux & Maher and Herrick & Herrick, for Republican. It is ordered by the court that appellant take and file its evidence by December 10, 1910, and appellee file its evidence by January 1, 1911, and appellant file its rebuttal by January 10, 1911, to all of which appellant excepts.

The record then shows the following:

Thereafter appellant took the testimony of Mary C. Murphy, by deposition, and also the testimony of seven other witnesses, being J. R. Lockin, John T. Hogan, appellee, Maud Lent, Winifred Fife, Oscar Wendt, A. B. Cobb, and O. H. Phipps, before the official shorthand reporter of said court, and all of said evidence was filed in said cause December 10, 1910. That before said order was made appellant also took the deposition of W. H. Rogers, and filed the same before said December 10, 1910. That upon the examination of the appellee, John T. Hogan, the books of said appellee were called for, and said books, consisting of the account books of said Cherokee Republican, were produced and marked Exhibits B, C, D, E, F, G, and H, and all the same were introduced in evidence by appellant. That appellant also called for and had identified as Exhibit A the original list filed by said John T. Hogan with the county auditor showing his subscribers to the Cherokee Republican, and offered the same in evidence. That said account books were some of the large, bulky books, with accounts of subscribers to said paper therein, and list of such subscribers. That the foregoing was all the evidence offered or introduced upon said trial by either party, prior to the time said cause came on for trial. That said cause was duly set for trial, and the same was duly tried January 11, 1911; said date being the ninth day of the regular January term, 1911, of said court.

The case came on for hearing in the district court, as stated.

The foregoing was all the evidence offered or intro-

duced upon said trial, save the list of subscribers to the Cherokee Times, which was permitted by the court to be offered, as shown by the ruling of the court set out on page ten of appellant's abstract in the decree. That said list of subscribers was marked as Exhibit 1, and the same, except the names of the subscribers, is as follows: 'State of Iowa, Cherokee County—ss.: I, Thomas McCulla, being first duly sworn, say that I am the editor of the Cherokee Times; that the annexed list are the *bona fide* yearly subscribers of the Cherokee Times living within the county, together with the correct post offices, where they get their mail, and the number of such subscribers to the best of my knowledge and belief, and as I verily believe. Thomas McCulla.' (Duly sworn to.) Then follows the following caption and summary: 'Summary showing subscribers to Cherokee Times residing in Cherokee County.' After this follows a list of post offices, with the number of names at each, making a total of 1,560. After this summary and list of post offices follows the names of the subscribers, grouped under the heads of the various post offices.

To this Hogan filed objections upon various grounds, and the trial court made the following order thereon:

And thereupon the appellant filed a motion that appellant be permitted to offer list of its subscribers, which was presented to the board of supervisors, in evidence, and take oral evidence in support of such list, to which motion the appellee filed objections, and the court, after consideration of the said matter, sustains said motion, so far as to permit the said appellant to offer said list in evidence, and overruled the said motion, so far as it asked permission to introduce oral testimony in support of said list. Both parties except to such ruling.

Thereafter and on the 19th day of January, 1911, the court entered an order affirming the action of the board and ordering judgment against appellants, the Cherokee Times and Thomas McCulla, for the costs. The notice of appeal to this court is entitled as in the caption to this opinion. It was directed to the clerk of the district court, Wilson, county auditor, and the attorneys for the Cherokee

Republican and John T. Hogan, and signed by J. A. Miller, attorney for appellants. It recited that the Cherokee Times and Thomas McCulla have appealed, etc.,

From the judgment and order of the district court of Cherokee county, Iowa, wherein the said court ordered that the testimony in said cause be taken by the respective parties thereto in writing, and same then filed in said court, and which order was made on the 1st day of November, 1910, and from the judgment, order, and findings entered in said cause on the 19th day of January, 1911, wherein the said judgment affirmed the action and order of the board of supervisors of Cherokee county, Iowa, in selecting the Cherokee Republican, published by John T. Hogan; as one of the official newspapers in and for Cherokee county, Iowa, and from the court's findings on said date against the Cherokee Times and Thos. McCulla, appellants. That the order of November 1, 1910, from which appellants appeal was made at the regular October, 1910, term of the district court of Cherokee county, Iowa, and the judgment against appellant, and from which he appeals, was entered against him on January 19, 1911, at the regular January, 1911, term of district court within and for Cherokee county, Iowa.

It should also be stated; although a little out of order, that the appeal to the district court, if there was one, was from the action of the board in naming the Cherokee Republican as one of the official newspapers of the county for the year 1910. On account of the confusion of names in this prolix record, and because no notice of appeal from the board was served upon the county auditor or other county official, and for the reason that there never was any direct appeal from the board's refusal to award the printing to appellant, appellees have filed a motion to dismiss the appeal to this court. While there is considerable confusion in the names given of appellant at different times during the course of the proceedings, the protests and pleadings in such contests should not be governed with too great

1. MUNICIPAL
CORPORATIONS:
county print-
ing: procedure.

strictness. They are largely informal in character before a board not accustomed to judicial procedure, and are usually conducted by the contending owners of the various papers published in the county. We think the identity of appellant sufficiently appears, and that, while there were changes in name from time to time, there never was any question as to who the contending parties were.

Section 441 of the Code Supplement, which has reference to these contests and the appeals therefrom, so far as material, reads as follows:

The board of supervisors of each county shall, at its January session in each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: In case of contest, the applicants shall each deposit with the county auditor, on or before a day named by the board of supervisors, a certified statement, subscribed and sworn to before some competent officer, giving the names of the several post offices, and the number and names of the *bona fide* yearly subscribers receiving their papers through each of said offices living within the county; such statements to be in sealed envelopes, and opened by the county auditor upon direction of the board of supervisors; and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers. . . . But in counties having a population of fifteen thousand or more, three papers, not more than two of which shall be published in the same town, shall be selected, in which such proceedings shall be published, with the same limitation as to compensation. . . . In case a contest is made by a publisher, the board shall receive other evidence of circulation, and he shall have the right to appeal to the district court, to be taken as in ordinary actions. . . .

There is a dispute in the record over the question as to whether the notice of appeal was served upon the county auditor or other county official. In a certification of the record from the district court appears the following:

VOL. 156 LA.—19.

Transcript of 'doings of board of supervisors.' That on said 22d day of January, A. D. 1910, the said Times Publishing Company and Thos. McCulla caused to be served on the undersigned, auditor of Cherokee county, an original notice of appeal in this matter, which notice is hereto attached and made a part of this transcript.

The attached notice does not show any service upon the auditor, although the notice was filed by him. In an affidavit appellant says that notice was in fact accepted by the clerk, but that the copy of the notice showing such service has been lost, and can not be found. Some confirmation of these facts is found in the transcript of the board's proceedings, and in the further fact that appellee did not move to dismiss in the district court. But whatever the truth here, we do not find any provision of statute requiring service upon any county official. Appeals are taken as in ordinary actions. The appeal is from the decision of the board, acting judicially; and the board has no more interest in maintaining its decision than any other tribunal. Neither it nor the county is in any just sense a party to the appeal. The statute also says that a contesting publisher shall have a right to appeal to the district court from the selection made, and the notice, in our opinion, need only be served upon the publisher against whom the protest has been lodged. The motion to dismiss the appeal should be overruled.

As the testimony in fact adduced upon the trial in the district court is not before us, we can not determine the real merits of the controversy. The only showing is that the total list of subscribers to the Cherokee Times, living within the county, was 1,560; but there is no showing as to the number of subscribers to the Cherokee Republican, or as to either of the other two papers, which were unsuccessful in the contest. We do not have before us the testimony

2. SAME:
appeal:
service of
notice.

3. SAME: trial:
depositions:
waiver of
error.

taken for appellant under the order of the district court, and the testimony offered for appellee has not been put in the record. This appeal is a special action, and, while not triable to a jury, it is to be heard as an ordinary action. *Starr v. Ingham*, 84 Iowa, 580, Code, section 3425. And section 3650 of the Code provides: "Issues of fact in an ordinary action must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is made."

Section 3651 also provides: "All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as provided by law; and, upon appeal, no evidence shall go to the Supreme Court except such as may be necessary to explain any exception taken in the cause, and such court shall hear and try the case only on the legal errors so presented."

The case is not triable *de novo* as in equity; and there is no provision whereby the court may order the case tried upon depositions or other written evidence. *Democrat Co. v. Lewis*, 90 Iowa, 304.

The provision for a reference, under section 3650, does not authorize an order for trial on deposition. A reference is something entirely different from an order to try on depositions. Reference may be with consent or without; but it is always to find the facts, or the facts and the law, and not simply to take testimony. Code, sections 3734, 3735, 3736, 3738, 3739, 3740, 3741, 3745, 3746 and 3748.

The order to take the testimony in writing seems to have been unauthorized. True appellant complied with it to a certain extent; but he excepted to the ruling, and did not, as we think, by complying with an unauthorized order of court, waive the error therein. Having saved his exception, he is entitled to question the same on appeal here. There seems to be no escape from the conclusion that the trial court was in error in deciding that the testimony be taken in writing.

Again, even if it be said that appellant has suffered no prejudice, because he did secure a consideration of such testimony as he took, it is manifest that if the order was erroneous appellant had the absolute right to introduce additional testimony on the trial; and this right was expressly denied him, as the record we have quoted discloses.

These two errors are, it seems to us, apparent, and the only doubt we have is what to do with the case, in view of the meager record as to the testimony. Upon reflection, we have concluded that, as the case is not triable *de novo*, but upon errors assigned, the usual rule obtains; that is to say, error once shown in a case triable here on error is presumed to be prejudicial, and calls for a reversal, unless lack of prejudice is affirmatively shown. *In re Estate of Lund*, 107 Iowa, 264; *Davis v. Clinton*, 55 Iowa, 549; *Brett v. Myers*, 65 Iowa, 274; *In re Harrington*, 54 Iowa, 33.

Under this rule, it is not necessary for appellant to bring up any more of the record than to show the error complained of. If appellee claims that the erroneous rulings were without prejudice, he must show that fact. This was not done in the instant case.

The motion to dismiss the appeal is overruled, and for the errors pointed out the order and judgment must be and they are—*Reversed*.

F. D. DUNKER, Appellant, v. THE CITY OF DES MOINES
and J. W. TURNER IMPROVEMENT COMPANY.

Municipal corporations: PUBLIC IMPROVEMENT: RESOLUTION OF NECESSITY. The statutes contemplate that the resolution of necessity for the construction of a public improvement, which is to be made at the expense of abutting property, shall describe the

adjacent property to be assessed; and failing to do so a contract for the work is invalid.

Same: SEWERAGE: PRESUMPTION AS TO OUTLET. Failure in the first instance to provide an outlet for a sewerage system will not render a contract for the construction of the work invalid; as it will be presumed that the city will provide such an outlet as will render the system serviceable.

Appeal from Polk District Court.—HON. JAMES P. HEWITT, Judge.

FRIDAY, JUNE 7, 1912.

APPEAL from an order refusing an injunction against a certain public improvement.—*Reversed and remanded.*

John L. Gillespie, for appellant.

Stipp & Perry, for appellee J. W. Turner Improvement Co.

Robert O. Brennan, H. W. Byers, and E. C. Carlson, for appellee City of Des Moines.

SHERWIN, J.—The city council of the city of Des Moines entered into a contract with the defendant J. W. Turner Improvement Company for the construction of a sewer of some fifteen miles in length in the eastern part of the city. The plaintiff herein is the owner of property abutting the proposed improvement, and brought this suit to enjoin the improvement company from constructing the sewer and to enjoin the city of Des Moines from assessing his property therefor, and from issuing warrants on the city sewer fund to pay for said improvement.

The appellant's first contention is that the contract entered into with the improvement company is invalid, be-

cause the resolution of necessity does not state what adjacent property is included in the sewer district for assessment. Section 810 of the Code provides that the resolution of necessity shall state "whether abutting property will be assessed . . . and what adjacent property is proposed to be assessed therefor." All that is said in the resolution of necessity as to what adjacent property will be assessed for the improvement is the following: "The cost of constructing said sewer to be assessed against property abutting thereon and against adjacent property in accordance with the law governing the same." The statute requires the resolution of necessity to state what adjacent property is proposed to be assessed for the sewer, and it is very evident that the resolution under consideration did not so state. The purpose of the resolution is to advise the owners of property of the proposed improvement, so that those whose party will be liable to assessment therefor may appear before the council and make objection thereto, if they so desire. This is manifest from the statute itself, for it expressly says "at which time the owners of the property subject to assessment may appear and make objection to the contemplated improvement or sewer and the passage of said proposed resolution." "Abutting property" is easily determined; but, unless the proposed resolution points out what adjacent property will be included in the proposed assessment, neither the owners of abutting property, nor the owners of property that may subsequently be determined to be adjacent to the sewer, can tell what area will be assessed for the improvement. The word "adjacent," as used in the section, does not of itself clearly determine or locate the land that may be finally brought within the assessment district because of the benefit it will receive from the sewer. The word "adjacent" is, at least, somewhat indefinite. Ordinarily, it means "to lie near, close, or contiguous." Webster. Even in its strictest

1. MUNICIPAL
CORPORATIONS:
public im-
provement:
resolution of
necessity.

sense it means no more than lying near, close, or contiguous, but not actually touching. "There are degrees of nearness, and, when you want to express the idea that a thing is immediately adjacent, you have to say so." *Haniffen v. Armitage* (C. C.) 117 Fed. 845; *Hennessey v. County*, 99 Wis. 129 (74 N. W. 983). It does not at all times mean "adjoining" or "abutting," but it is many times so used. *Wormley v. Wright Co.*, 108 Iowa, 232. The word clearly does not mean "adjoining" or "abutting" in the statute under consideration, for the same section makes the proper distinction between "adjacent" and "adjoining" in definite language. It is left, then, for the city council to determine what property shall be included as "adjacent" to the sewer for the purposes of assessment, and we think this should be done and the property so designated in the proposed resolution of necessity as to inform property owners, with reasonable certainty, of the lands that will be included in the sewer district for assessment. It may often happen that property which is clearly geographically adjacent to a proposed sewer is not subject to assessment for that particular sewer, and, as such matters must be determined primarily by the council, we think it should be done before the resolution of necessity is published, and thus give all interested parties proper information so that they may determine whether they want to object to the sewer, or to the passage of the proposed resolution.

The appellees contend that the provisions of sections 819, 820, 821 and 823 negative our construction of section 810. But we are unable to see any conflict between the sections under our construction of 810. Sections 819 and 820 do no more than to direct how the cost of a sewer may be paid, and the tax that may be placed on abutting and adjacent property. Section 821 provides for a plat and schedule showing the streets, avenues, highways, alleys, and the separate lots or parcels of ground, subject to assess-

ment for the improvement, and the names of the owners thereof, and the amount to be assessed against each lot or parcel of ground. This requirement is evidently supplemental to the requirement of section 810, for the purpose of advising interested parties of the streets and alleys affected by the improvement, and of the exact amount assessed against each lot or parcel of ground in the sewer district. Otherwise, the property owners would be in no position to intelligently object to their individual assessments, nor would the council be in a better position in determining what each parcel of ground should be assessed. And, finally, section 823 does no more than to provide an opportunity to the property owner to be heard in opposition to the assessment and to the prior proceedings.

II. We are of the opinion that the resolution of necessity was sufficiently specific as to method of construction. *Nixon v. Burlington*, 141 Iowa, 323.

III. We also think the terms of payment were stated with sufficient clearness, and that competition among bidders was not interfered with by any of the council's proceedings.

IV. No outlet has been provided for this contemplated sewer, and because thereof appellant says that the contract is invalid. It is to be presumed that the city will at the proper time provide such an outlet as will make the sewer serviceable. The construction of fifteen miles of sewer, with no means provided for using any part of the system, would be robbing the property owners, and the courts would soon compel action that would make the sewer useful and effective. the objection on this ground can not be sustained. See *Bell v. City of Burlington*, 154 Iowa, 607; *Pages & Jones on Taxation by Assessment*, section 401; *Ryder's Estate v. Alton*, 175 Ill. 94 (51 N. E. 821); *South Highland Co. v. Kansas City*, 172 Mo. 523 (72 S. W. 944); *Maywood Co. v. Village of Maywood*, 140 Ill. 216 (29 N. E. 704);

2. SAME: sewer-
age: presump-
tion as to
outlet.

Hamilton on Special Assessments, section 414, and cases cited.

For the reason stated in the first division of this opinion, the judgment of the trial court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.—*Reversed and remanded.*

EUGENE LEVI, Administrator, v. EMILE S. LEVI, Appellant.

Fraudulent conveyances: CREDITOR'S RIGHTS: EVIDENCE OF INDEBTED-

- 1 **NESS.** When a secret, voluntary conveyance of property has been set aside at the suit of a pre-existing creditor, he may not only subject the property to payment of that portion of his claim then accrued, but also to the balance thereafter accruing. In this action the evidence is held to show that the grantor was indebted to plaintiffs at the date of the conveyance.

Same: ACCEPTANCE OF CONVEYANCE: KNOWLEDGE OF INDEBTEDNESS.

- 2 One who obtains title to property by a secret, voluntary conveyance and allows his grantor to retain the apparent ownership, on the strength of which credit is extended the grantor, can not insist on his right to the property as against such creditor; and it is immaterial that he had no fraudulent intent in accepting the conveyance, or that he was unaware of the grantor's accumulating indebtedness; but in this instance the evidence discloses sufficient knowledge of the circumstances to put him on inquiry regarding the grantor's indebtedness.

Same: ESTATES OF DECEDENTS: ALLOWANCE OF CLAIMS: EFFECT. Where

- 3 the defendant in an action to subject the land secretly conveyed to him by his mother, to the satisfaction of her debt, did not appear and resist an allowance of the claim against her estate, the allowance of the claim was not *prima facie* proof of its correctness as against him.

Evidence: FIRM BOOKS OF ACCOUNT. Where a firm, carrying on a

- 4 mercantile business, also acted as the financial agent of a party in the collection of rents and the disbursement of the funds thus collected, under the direction of such party, the entries in the firm books made in the ordinary course of business, showing advances and charges expended for the party were competent evidence against her and also against her grantee, in a suit to

subject the property conveyed to the payment of her debt; and the books themselves having been properly identified and the entries having been shown to have been made in the ordinary course of the firm business, outside of its mercantile business, constituted competent evidence of the money thus received and paid out, in the absence of anything to impeach the good faith of the transactions.

Same: GOOD FAITH ENTRIES: EVIDENCE. The mere failure of a member of the firm to distribute his father's estate and turn over to the firm the share belonging to his mother, for whom the firm was acting as financial agent, was insufficient to charge the firm with bad faith and defeat its right to recover the sum due it, as shown by the account with her proven by competent evidence.

Appeal from Dubuque District Court.—HON. ROBERT BONSON, Judge.

FRIDAY, JUNE 7, 1912.

ACTION in equity, brought by plaintiff, as administrator of the estate of Minette Levi, to subject to the payment of her debt to the firm of James Levi & Co. certain described real property, which during her lifetime had been conveyed to the defendant without consideration and by way of gift by a deed deposited with a third person and delivered to defendant only after grantor's death; the allegation being that at the time of the execution of such conveyance she was indebted to said firm and at the time of her death possessed no other property out of which her indebtedness could be satisfied, and that the greater part of the indebtedness was contracted after the execution of such conveyance but without knowledge thereof on the part of the creditor, and that credit was given to her in reliance on her continued ownership of such property. There was a decree for the plaintiff, finding that Minette Levi was at the time of her death indebted to the firm of James Levi & Co. in the sum of \$12,136.82, which had been previously established and allowed in the probate court

as a claim against her estate, and that the real estate described in plaintiff's petition was subject to the payment of such debt as should remain unpaid after proper application of all other property of her estate, establishing a lien, etc. From this decree the defendant appeals.—*Affirmed.*

Kenline & Roedell, N. J. Lee and Emile S. Levi, for appellant.

Lacy, Brown & Lacy, for appellee.

McCLAIN, C. J.—A brief narrative of the relations between the parties concerned in this litigation and the circumstances under which the alleged indebtedness of Minette Levi to the firm of James Levi & Co. was contracted will serve as a basis for the discussion of the various questions presented by counsel.

Prior to 1887, Alexander Levi had had an interest in a retail mercantile business conducted in the name of James Levi, who was his nephew and son-in-law. In that year Alexander transferred his interest to his son Eugene, and the firm name became James Levi & Co., and this firm continuing to the present time is the sole creditor in whose behalf it is now sought to subject property conveyed by Minette Levi to defendant to the payment of her debts.

About the year 1883, Alexander Levi distributed his real property among his children by deeds reserving to himself a life estate in portions thereof, and in consequence of this distribution his daughter Selina, wife of James Levi, his son Gus, a deaf mute, and his son Emile, defendant in this action, acquired each a one-third interest in property known as the Levi Block, subject to the reserved life estate. As a part of this distribution, James Levi became the owner of a vacant lot, on which he erected a dwelling house, which became the home not only of himself and wife, but also of Alexander and Minette Levi. For a time

the expenses of conducting the household were shared jointly, but subsequently some arrangement was made by which Alexander paid board for himself and wife at the rate of \$840 per year. From 1887, when Alexander Levi ceased to have an interest in the retail business, until his death in 1893, he continued to receive the income from real property of which he had been the owner and in which he retained a life interest, and also from the real property to which this controversy relates, known as the Fourth street property, which was not involved in the distribution made in 1883 and was assumed to be his property, although it appeared after his death that he had conveyed it to his wife, Minette, in 1881. The business of collecting this income, and on the other hand paying taxes and insurance and making repairs as to all these properties, was conducted through the firm of James Levi & Co., who carried an account with Alexander Levi on which he was credited with sums received and charged with moneys paid out on account of these properties, and in this account Alexander was charged annually with the sum of \$840 for board for himself and wife.

After the death of Alexander Levi, it became known that the widow held the title to the Fourth street property, and that the three children had each a one-third interest in the Levi Block, and thereafter the firm received the rent of the Fourth street property for the widow and paid for taxes, insurance, and repairs thereon, entering receipts and payments on the books of the firm in an account kept with her. This defendant then represented to his mother that he had not received his fair share in the distribution of his father's property and secured with her an arrangement that his one-third of the taxes, insurance, and repairs on the Levi Block should also be charged to her account by the firm. From time to time the firm advanced sums of money to the widow, which were charged to her account, but for which no receipts were taken. The firm also

charged to her once each year an item for board to the amount of \$420, being half the amount for which Alexander Levi had been charged annually on the books of the firm for the board of himself and wife. The firm also paid out on her account various contributions made by her to the support of the rabbi and to the support of relatives, including the son Gus, which were also paid out without receipts being taken. The firm also charged to her account merchandise furnished to her in its mercantile business and paid various bills, for which, to some extent at least, receipts were taken and held by the firm. The entries of these receipts and charges were made in the regular course of business on the books of the firm by the members thereof and by their bookkeepers.

After the death of Minette Levi in March, 1907, this plaintiff, who, as already indicated, was her son and a member of the firm of James Levi & Co., was appointed her administrator, and the firm filed with the administrator an account against decedent showing a balance due the firm of \$12,136.87. The probate court appointed a special administrator to examine this account, and in due course it was approved and allowed by the court as a claim against the estate, and it constituted the only claim so filed and allowed.

From the time of the death of Alexander in 1893 until her own death in 1907, Minette Levi was apparently the owner of the Fourth street property and had an interest indeterminate in value in the estate of her deceased husband, which remained unsettled, and she had no other property. The Fourth street place was worth from \$20,000 to \$25,000. Immediately after her death, a deed of the Fourth street place, secretly executed by her a few months after her husband's death to this defendant and deposited with the lawyer who drew it, was delivered to this defendant and placed on record. This deed, absolute in form, had attached to it a memorandum of instructions reciting

its delivery to the lawyer to be kept and held by him for the grantee until the death of the grantor, on the happening of which event the deed was to be delivered to the grantee (this defendant), his heirs, executors, or assigns; this memorandum being signed by the grantor.

Substantially two questions were submitted to the lower court for determination: First, can the property described in the deed last above referred to be subjected in the hands of the defendant to the payment of the account of James Levi & Co. which had been allowed by the probate court as a just claim against the estate of his mother; and second, is there sufficient evidence to justify and require the enforcement against the property of the entire amount of the claim thus allowed?

I. It is conceded that the conveyance of the Fourth street property to defendant by his mother was wholly without consideration and voluntary, and that the firm of James Levi & Co., if an existing creditor of Minette Levi at the time this voluntary conveyance was made, may enforce any valid claim it has against her estate by causing to be subjected to its payment the property thus voluntarily conveyed. That is to say, if the firm was a creditor when the conveyance was made, it may have the conveyance set aside and the property subjected to the payment not only of that portion of its claim which antedated the conveyance, but also the balance of its claim which accrued after the conveyance. This is on the general principle, not questioned by counsel for appellant, that when a conveyance is set aside at the suit of a pre-existing creditor, all creditors, whether antecedent or subsequent, may come in for the satisfaction of their claims. *O'Brien v. Stambach*, 101 Iowa, 40.

1. FRAUDULENT
CONVEYANCES:
creditor's
rights; evi-
dence of in-
debtedness.

Counsel for appellant insist, however, that the firm of James Levi & Co. was not a creditor at the time of the execution of the deed, and they present a showing from

the itemized account of the firm indicating a small balance due the firm at the date of the conveyance with the additional contention that, if certain small credits omitted from the account had at that time been given, there would have been a small balance in favor of Minette Levi. Without an elaboration of details, the explanation of which in the evidence is rather complicated but to us is satisfactory, we need to do no more than announce our conclusion from the record that the account is in this respect correct, and that at the date of the execution of the deed Minette Levi was to the extent of \$100 or more indebted to the firm. The uncertainty as to the amount is due to the fact that she had not yet been charged at the time of her death with the item of board for a portion of the year. In other words, the account as presented, and which we find to be correct, showed her indebtedness to the firm to be about \$50, to which the firm would be entitled to add a further sum for board accrued for a part of the year under the arrangement already explained by which she was charged on the books of the firm with the lump sum of \$420 for board.

But without regard to the question whether the firm was a creditor at the time the voluntary conveyance to defendant was executed, we think that the firm may enforce

2. SAME: acceptance of conveyance: knowledge of indebtedness. payment of its claim out of the property conveyed to defendant by secret deed, in view of the fact that the property thus conveyed was substantially all the property of the grantor, and that the firm gave her credit on account of her apparent ownership of such property. One who takes title by a secret voluntary conveyance and allows his vendor to remain in apparent ownership of the property conveyed, which is in good faith made subsequently the basis of extending credit to such grantor, can not, as against the subsequent creditor thus misled, insist that he has a higher claim to the property than the creditor. A court of equity will subject such property to the satisfaction of the credit-

or's valid claim. This rule seems to be so fundamental that a reference to general statements by text-writers collecting the authorities bearing on the subject is sufficient. See Wait, *Fraudulent Conveyances* (3 Ed.) 375, 419; 14 Am. & Eng. Ency. of Law (2d Ed.) 250, 259; 20 Cyc. 425.

It is immaterial that the vendee had no fraudulent intent in accepting the conveyance. He is not entitled to give it a fraudulent effect by asserting his title as against a creditor who has in good faith made advances in reliance on the apparent title of the grantor. *Curtis v. Lewis*, 74 Conn. 367, 371, (50 Atl. 878). And this principle has been specifically applied to cases where a voluntary conveyance has been placed in the hands of a third person for delivery to the grantee after the grantor's death. *Rathmell v. Shirey*, 60 Ohio St. 187 (53 N. E. 1098); *Taft v. Taft*, 59 Mich. 185 (26 N. W. 426, 60 Am. Rep. 291); *Wolcott v. Johns*, 7 Colo. App. 360 (44 Pac. 675).

We do not regard it as important on this phase of the case that Minette Levi should have been advised that the debit side of her account was growing faster than the credit side. She must be presumed to have assented to the account as a whole if she was properly chargeable with the various items. We do not stop therefore to consider the question whether testimony of the members of the firm that she assured them the account would be paid was admissible, in view of the statute relating to communications and transactions with a deceased person. It seems to us equally immaterial whether the defendant was aware of the growth of the account against his mother. If he allowed the property to remain in his mother's name as apparent owner, and the firm in reliance upon such apparent ownership extended credit to her, he is in no situation to say that he was not aware of credit being extended.

But if it were necessary to reach a conclusion as to defendant's knowledge of the accruing account against his mother, we should have no hesitation, under the evidence,

in finding that he had at least sufficient knowledge of the circumstances to put him on inquiry as to the fact, if the fact itself were material. The members of the firm testified that from time to time defendant looked over the books of the firm and noticed the tax receipts and charges for insurance which the firm was entering on its books as against his mother. He certainly must be presumed to have been aware of the fact that the firm was charging to his mother the taxes and insurance on his one-third of the Levi Block, for he testifies that he had an arrangement with his mother by which this should be done.

Our conclusion therefore is that whatever just account James Levi & Co. had against Minette Levi at the time of her death may now be properly enforced as a charge against the land deeded by her to the defendant. The court made provision in its decree that any assets of her estate be first applied to the satisfaction of the indebtedness, and of these provisions no complaint is made.

II. In regard to the correctness of the account as a whole, one of the contentions for appellee is that the regular allowance and establishment of the claim against the administrator is *prima facie* proof of its correctness as against defendant, grantee of the decedent. But this court seems to have held otherwise in the case of *Milburn v. East*, 128 Iowa, 101. Defendant, as one of those entitled to participate in the distribution of his mother's estate, might, no doubt, have appeared and resisted the allowance of the claim; but his failure to do so would not, in our judgment, preclude him from questioning the validity of the claim after it was allowed by the probate court, when it was sought in this proceeding to subject to the payment of such claim the real estate which the defendant claimed title to under a deed executed before the death of his mother. This seems to have been the view of the trial court, for it proceeded to take testimony as to the validity

3. SAME: estates
of decedents:
allowance
of claims:
effect.

of the claim, and we shall deal with the question on the evidence as though it were a question now for original determination as between the creditor and this defendant.

Looking at the account as a whole, we find that it covers the entire period of fourteen years from the death of Alexander Levi to the death of Minette Levi; that it shows credit items entered from month to month in the aggregate of \$21,857.47, which are explained by the testimony of the members of the firm as being the rents received on the property to which this controversy relates, and there is no contention for defendant that all the rentals from that property down to the end of the year 1905 are not credited to Minette Levi as cash received by the firm for her. It appears that after 1905 the defendant collected these rents for his mother. On the other hand, debit items for the fourteen years aggregate \$33,995.34; and, roughly dividing these items into groups, it appears that about \$10,000 was for money paid out by the firm for taxes, insurance, and repairs on the property of Minette Levi and on account of defendant's one-third interest in the Levi Block under the arrangement already referred to. So far as taxes paid are included in this aggregate sum, receipts therefor were introduced in evidence, showing payment thereof by the firm. There are also some receipts for insurance of the property of Minette Levi and also for the Levi Block paid the firm; one-third of the amount of the insurance paid on the Levi Block being charged to the account of Minette Levi. The items of taxes, insurance, and repairs charged to Minette Levi on account of defendant's one-third interest in the Levi Block amount to more than \$5,000. The total of items for merchandise purchased by Minette Levi of the firm and charged to her account is slightly in excess of \$700; the aggregate of items for each year being transferred from the general books of the firm showing sales of merchandise to the general account of Minette Levi. Items for bills paid on account of the son

Gus. at the direction of his mother and charged to her account exceed in their aggregate \$2,000. Items of bills paid for defendant by his mother's direction exceed in their aggregate \$1,300. The only other considerable group of items which can be conveniently lumped together consists of the annual charge to Minette Levi of \$420 per year as board; that amount being charged to her account once each year and credited on the account of James Levi. The total for board was therefore nearly \$6,000.

Taking the account as a whole, the first question is whether the entries on the books of the firm constitute competent evidence of charges against Minette Levi. It

4. EVIDENCE:
firm books
of account. appears that the entries were made in regular account books by members of the firm and by its clerks. The handwriting in which the entries were made is identified in the evidence as being that of the partners and of persons who were regularly acting as clerks in their employ. One of these clerks died before the trial, and his handwriting was sufficiently proven. The entries made by members of the firm and by other clerks were identified by their own testimony. There is no question, therefore, as to the competency of the account books to prove these items of charge against Minette Levi, save that, as is contended, the books of the firm carrying on a mercantile business are not competent to prove items of moneys loaned or advanced. On this question we are referred to several decisions of this court to the effect that charges for money paid and money lent can not be proved by the books of account of the party offering them unless he is engaged in some general business involving the payment of money on account such as the business of banking. *Veiths v. Hagge*, 8 Iowa, 219; *Sloan v. Ault*, 8 Iowa, 229; *Cummins v. Hull's Adm'r*, 35 Iowa, 253; *Orcutt v. Hanson*, 70 Iowa, 604; *Young v. Jones*, 8 Iowa, 219. But so far as the firm was carrying on the business of collecting rents for Minette Levi

and dispensing under her direction the money thus collected, it was not carrying on simply a mercantile business, but was acting as her financial agent, and we think that entries in its books made in the ordinary course of business, showing charges for moneys advanced or expended on her account, were competent evidence as against her, and therefore as against defendant in this action. The views of the court expressed in the cases just cited support this conclusion.

In the case of *Veiths v. Hagge, supra*, the question whether entries of charges in account books are admissible in evidence is made to depend on whether they appear to have been made in the ordinary course of business; and in *Young v. Jones, supra*, it is said that, if the payment or loan of money constitutes in any just sense the ordinary business of the person in whose books charges for money paid are found, he may justly claim the right to prove them by his books. In *Orcutt v. Hanson, supra*, it appeared that the party whose books were introduced in evidence was engaged in the real estate, general brokerage, and discount business, and the business of loaning money, and that his books showed a continuous dealing with others as a money broker, and that the character of the business with the party against whose estate it was sought to establish an account for money advanced to him was that of loaning money and advancing money for him, and the entries of sums of money loaned and advanced were held to be competent. Under our statute (Code, section 4623), books of account, to be admissible in evidence against the party sought to be charged thereby, "must show a continuous dealing with persons generally or several items of charge at different times against the other party in the same book or set of books." The other requirements of the statute having been met in this case, we reach the conclusion that the books of the firm offered in evidence were admissible to show charges for money paid to Minette Levi or paid

to others on her account or at her direction; the entries having been made in the ordinary course of a business for the firm carried on outside of its mercantile business and as the financial agent of the person charged. The books being properly identified, and entries being shown to be made in the ordinary course of business, the books themselves constituted competent evidence of the facts disclosed as to money paid to or on account of Minette Levi. *State v. Brady*, 100 Iowa, 191.

As to particular items of charge, the propriety of which is questioned by the appellant, we shall indulge in but slight elaboration. It appears that in 1894 and 1895, Minette Levi took a trip abroad with her son Eugene, the total expense of which for both of them amounted to about \$4,000, and that on their return Eugene Levi caused to be charged on the books against his mother and credited on the firm's books in his favor the sum of \$1,000, to cover expenses of her treatment for an injury resulting from an accident, the sums paid out on her account for presents which she brought back for defendant and others of her relatives, and like matters. So far as we can ascertain from the record, the item of charge was reasonable and the entry on the books admissible for the purpose of establishing a proper charge against her. It appears that about \$200 was paid out and charged to Minette Levi's account at various times for Christmas and birthday presents to the children of James and for school tuition on account of one of his sons. These items are sufficiently proven by the entries made under the principles already announced. It appears that several small sums of money were charged on the account as having been paid to her, although the money in these instances was given to the children of James Levi to be taken to her. There is nothing in the record to impeach the good faith of these transactions. The items last above enumerated are specifically referred to here for the reason that they are made the basis of the claim that

the firm does not come into court with clean hands, being chargeable with the perversion of the funds of Minette Levi. In the absence of any evidence that these transactions were not in good faith, we would not be justified in refusing relief as to the entire account to the firm.

It is also said in this connection that Eugene Levi had funds of his father's estate in his hands for which he had not accounted as administrator of his estate. But, as to these funds, the defendant is fully protected

5. SAME: good
faith entries:
evidence.

by a provision in the decree requiring that they be applied on the account. Surely, a mere failure on the part of Eugene Levi without demand from his mother to specifically distribute the estate of his father and turn over to her such sum as she might be entitled to receive could not be charged to the firm as bad faith defeating the recovery of its just account.

On the whole, it is sufficient to say with reference to the account that it is proven by competent evidence, and that no items thereof are so far impeached as to require their disallowance. The trial court had before it not only the account itself, but the testimony of witnesses taken in great detail with reference to specific items, and large amounts paid for taxes, for insurance, and for bills presented by third persons against Minette Levi and this defendant are shown by receipts to have been paid out by the firm. We find no occasion for diminishing the amount of the account as allowed by the trial court.

The preceding discussion covers all of the objections made in behalf of defendant to the allowance of the claim as a charge on the property received by him from his mother. Further elaboration of details would be of no benefit to the defendant.

We reach the conclusion that the decree of the trial court was correct, and it is—*Affirmed*.

PLEAS STARR, Appellee, v. CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY, Appellant.

Carriers of passengers: DISORDERLY CONDUCT: NEGLIGENCE: EVIDENCE.

It is the duty of a railway company to exercise care for the safety of its passengers; and where an intoxicated person enters a train and his presence is known to the trainmen it becomes their duty to prevent such person from assaulting and injuring another passenger. The evidence in this case is held to require submission of defendant's negligence, through failure of the trainmen to protect plaintiff from the assault of an intoxicated passenger, and to justify a finding of negligence in that regard.

Appeal from Appanoose District Court.—HON. D. M.
ANDERSON, JUDGE.

FRIDAY, JUNE 7, 1912.

ACTION at law to recover damages for personal injury.
Verdict and judgment for plaintiff, and defendant appeals.
—*Affirmed.*

Frank S. Payne, and Miles & Steele, for appellant.

Wilson & Smith, and W. F. Garrett, for appellee.

WEAVER, J.—The plaintiff was a passenger upon defendant's train going from Carrolton, Mo., to Moulton, Iowa. He alleges that among the passengers upon said train were several who were intoxicated and quarrelsome; and that during that journey said persons, without cause or provocation, attacked, beat, bruised, and injured him. He further alleges that said wrongful assault was witnessed by the conductor and brakeman in charge of the train,

who, in violation of their duty to protect him against such abuse and injury, failed to interfere in any manner with his assailants, or to keep or enforce order upon the train; and that by reason of such neglect and failure of duty on the part of said trainmen, he sustained severe injuries, for which he demands compensation in damages. The defendant denies the charges made in the petition. The issues were tried to a jury, resulting in verdict and judgment for plaintiff for \$1,000.

There was evidence upon which the jury could properly find that plaintiff, with a younger companion, named Horn, took passage upon defendant's train moving north in the direction of Moulton. They were sober and quiet, and, so far as appears, exhibited a decent degree of decorum. At the town of Unionville, one Guffey, with two or three others, boarded the train. Guffey, at least, was visibly under the influence of liquor, and soon proceeded to make a nuisance of himself by walking up and down the aisle trying to persuade others to drink with him, or to engage in a game of craps. Among others, he accosted the young man Horn, who was with plaintiff, and, being refused and taking offense at some remark made by Horn, struck him. Thereupon plaintiff arose and said to Guffey: "If the boy don't want to gamble with you, let him alone," and as he took his seat was at once attacked by Guffey. After some struggle, Guffey's friends took him aside and endeavored to quiet him; but he soon broke away and renewed his assault upon the plaintiff. The latter fell over a car seat, or was knocked down, where he was struck or kicked in the face and upon the body, receiving sever and painful injuries. There is also evidence to the effect that the conductor and brakeman came into the car about the time the assault was made, or while the struggle was in progress, but did not attempt to assist or protect the plaintiff. The conductor was not a witness on the trial. The brakeman admits that he came into the car during the assault

upon plaintiff, and says the extent of his effort to interfere was to walk in that direction and call to two of the passengers "to separate them." Some of the details above mentioned are the subject of dispute between witnesses; but the jury were fully justified in finding that the assault upon the plaintiff was brutal in the extreme, and was not induced by any misconduct on his part.

Counsel for appellant say all this may be true; but there is no evidence upon which negligence can be charged against the defendant or its trainmen. We do not so read the record. Guffey was noticeably intoxicated when he boarded the train, and this was seen by the brakeman; and his conduct during the whole course of the trip was such as should have attracted the attention and met with the effective protest and interference of the men whose business it was to care for the safety of the passengers. If some of the witnesses are to be believed, both the conductor and the brakeman actually witnessed a material part of the affair without the slightest attempt to exert their authority to enforce peace and good order. The brakeman himself, as we have seen, being present, limited his efforts in that line to an exhortation to some of the passengers to interfere and do that which he himself should have been quick to do. True some of plaintiff's testimony is contradicted, and some inconsistencies are developed between statements on the witness stand and statements made elsewhere; but the credibility of the witnesses and the weight of their testimony were for the jury alone.

The duty of a carrier of passengers to exercise care for their protection against injury is too well settled to justify argument. The verdict in this case is that there was a failure of duty in this respect on the part of the defendant; and, in our judgment, the testimony affords ample support for the finding. Certainly there was no such lack of evidence as to call for a directed verdict. That the jury was not in any way confused as to the question before

it was shown by their answers to several interrogatories submitted to them at defendant's request. The record in this respect, as shown in appellant's abstract, is as follows:

Before argument of counsel to the jury had commenced, the defendant requested the court to ask the jury, in writing, to find especially upon certain questions of fact to be answered by the jury in writing, which questions of fact were in writing, and were submitted to the attorneys for the plaintiff before argument to the jury had commenced. That upon the giving of the charge and instructions by the court to the jury the court then submitted said questions in writing to the jury, and which questions were in words and figures as follows, to wit: '(1) Was there any conduct of Ollie Guffey on the train, prior to the trouble between said Guffey and the witness Ed Horn, from which the employees in charge of the train in question, in the exercise of due and proper care, ought reasonably to have anticipated that said Guffey was likely to make an assault on any of the passengers on the train? (2) If you answer the foregoing interrogatory affirmatively, then state what said conduct was.' When the jury returned its verdict into court, it also returned into court said questions, with its answers thereto, in writing, and which answers of the jury were as follows: To question 1, the jury answered, 'Yes,' and to question 2 the jury answered in the following words, to wit: 'Ollie Guffey was drunk, disorderly, boisterous, walking up and down the aisle, using profane and vulgar language, and urging several of the passengers to drink and play craps with him.'

With these findings, all of which have support in the record, there is little room left for the claim that the court should have held, as a matter of law, that the defendant was chargeable with no negligence in the premises.

The appellant has assigned error upon the giving of certain instructions and the refusal to give others requested; but, in so far as the points made state correct propositions of law, they were sufficiently covered by the court's charge to the jury.

Upon other questions thus raised, we are cited to no

authority; and the discussion has little direct application to the concrete questions of fact upon which the decision of this appeal must turn.

We find no error in the record, and the judgment below is—*Affirmed*.

F. W. RAMPTON, Appellant, v. G. L. DOBSON, Treasurer of POLK COUNTY, IOWA, Appellee.

Taxation: LAND CONTRACTS. A written agreement to purchase real
1 property and to pay therefor a stated sum at specified times, a
portion of which was paid on the execution of the agreement,
and with right of forfeiture in case of default, constitutes a
binding contract which is taxable to the vendor, and is not a
mere option to purchase. The agreement in this case as written
and under the construction placed upon it by the parties at the
trial is held to constitute an enforceable contract.

Same: OPTION AGREEMENTS. An option to purchase real estate is
2 not a sale, nor is it an agreement to sell; but is simply a con-
tinuing offer, which must be accepted before it will become an
enforceable contract.

Evans, J., dissenting.

Appeal from Polk District Court.—HON. LAWRENCE DE
GRAFF, JUDGE.

SATURDAY, JUNE 8, 1912.

THIS is an appeal from an assessment of omitted moneys and credits. Plaintiff was assessed by the treasurer of Polk County with omitted credits to the amount of about \$15,000, and from such assessment appealed to the district court. Upon trial in that court the assessment was confirmed, and plaintiff appeals.—*Affirmed*.

W. L. Smith and E. P. Hudson, for appellant.

Hewitt, Miller & Wallingford, for appellee.

DEEMER, J.—The land contract upon which the assessment was based was entered into between Rampton, party of the first part, and Milne & Milne, party of the second part, on October 29, 1907. It is an ordinary contract for the sale of certain lands in Benton county, Iowa, for the agreed consideration of \$34,560; the agreement of the first parties being to sell to the parties of the second part on performance of the agreements of said second parties by good and sufficient warranty deed the premises described. The agreement of the second parties was as follows:

1. TAXATION:
land con-
tracts.

And the said party of the second part in consideration of the premises, hereby agree to and with the party of the first part to purchase all his right, title and interest in and to the real estate above described for the sum of thirty-four thousand five hundred sixty dollars, and to pay said sum therefor to the party of the first part, his heirs, or assigns as follows: Nine hundred 00-100 dollars on the execution of this agreement, and the party of the first part hereby acknowledges receipt of the same. Thirty-three thousand six hundred sixty dollars in two payments, to wit: First payment, 1st day of March, 1908, \$28,660.00 cash, and by assuming a mortgage of \$5,000.00 now against the premises with interest thereon from March 1, 1908, all subject to a lease between first party and Powell Bros., expiring March 1, 1909, which is to assign to second parties on March 1, 1908, with rent notes for the year 1908. Second party will insure the buildings on the premises and if buildings should be damaged or destroyed by fire prior to March 1, 1908, second party shall be entitled to insurance collected and shall accept same in full of damages done to premises. With interest from this date at the rate of ——— per cent per annum on all sums as shall remain unpaid, until all is paid, payable at Dysart Savings Bank, Dysart, Iowa.

And the agreement further provides:

And it is expressly agreed by and between the parties hereto that the time and times of payment of said sums of money, interest, and taxes as aforesaid is the essence and im-

portant part of the contract, and that if any default is made in any of the payments or agreements above mentioned to be performed by the party of the second part in consideration of the damage, injury and expense thereby resulting or that may be incurred by or to the party of the first part hereby, this agreement shall be void and of no effect, and the party of the second part shall have no claim in law nor equity against the party of the first part, nor to the above-mentioned real estate, nor any part thereof; and any claim, or interest, or right, the party of the second part may have hereunder up to that time by reason hereof or if any payments and improvements made hereunder, shall, on all such default, cease and determine, and become forfeited, without any declaration of forfeiture, re-entry, or any act of the party of the first part. And if the party of the second part or any other person or persons, shall be in possession of said real estate, or any part thereof, he or they will peaceably remove therefrom, or in default thereof, he or they may be treated as tenants holding over unlawfully after the expiration of a lease, and may be ousted and removed as such. But if such sums of money, interest, and taxes are paid as aforesaid, promptly at the times aforesaid, the party of the first part will, on receiving said money and interest, execute and deliver, at his own cost and expense, a warranty deed of said premises as above agreed. Possession reserved until March 1, 1909.

On the face of it, this contract was taxable as moneys and credits under a long line of authorities. See *Talley v. Brown*, 146 Iowa, 360, and cases cited. But, to avoid its listing for taxation, Rampton and one of the Milnes took the stand and gave testimony which it is claimed shows that the contract was not taxable because it was a mere option. That we may have the testimony before us, we here quote: Rampton testified, in substance:

Made a contract with Mr. Milne to sell the farm the 1st of March. \$900 was paid. Q. In case of nonpayment of the purchase price the 1st of March, what, if anything, was to happen? A. I was to still hold the farm. Q. This money that was to be paid, what was to be done with that? A. It was to be forfeited. . . . At the time of signing

the contract to sell the farm to G. H. Milne and J. S. Milne, \$900 was paid. The balance was paid according to the terms of the contract shortly after March 1, 1908, and deed was executed to these parties in March, 1908. . . . I paid the taxes on the farm for 1906 and 1907. Mr. Milne paid the taxes for 1908 which became due January 1, 1909. He took possession of the farm in March, 1908, after the deal was closed up. . . . The place had been insured, and just run out, and I told him it would not pay me to get it insured. I was responsible for the building up to the 1st of March, because I owned the farm up to the 1st of March. I supposed if the buildings burned he would not want to take the farm without me losing the buildings. I supposed he expected to take it. . . . Q. Do you wish the court to understand that Milne and his brother and yourself entered into a contract in good faith, which provided in substance that you were to receive from Milne the sum of \$900 that you were to keep, that you were to give them any and all right that you might have in the proceeds of the insurance policy on the premises if the improvements would burn prior to the 1st day of March, 1908, and after the signing of the contract, and that you at the same time would have no right under the contract to compel Mr. Milne or his brother to carry out the provisions of them if they didn't want to? A. Provisions of taking the place? Q. Yes. A. No, I could not compel them to take the place. Q. That is what you wish the court to understand? A. Yes, sir. Q. You were to keep the \$900 in that event and not give them any part of it? A. That, according to contract. Q. They were willing to give you \$900 simply for the right to buy on March 1, 1908? A. Yes, sir. Q. Without any rebate if they decided not to buy? A. Yes, sir. I came right home and never saw the Milnes until I went back the 1st of March. . . . Received the purchase price on the farm on the 1st of March or thereabout, A. D. 1908.

Milne gave this testimony:

My brother and I bought Mr. Rampton's farm October 29, 1907, made the first arrangements for the purchase at Dysart. Found Mr. Rampton at his sister's at Dysart, talked the matter over there, and went uptown and drew

up the contract. Henry Mohler, cashier of the Savings Bank, drew up the contract. . . . Q. What was said or what was your understanding, in regard to this \$900 that was paid, in case you failed to make further payments the 1st of March? A. The way I took it, we was to lose it if we didn't make the terms. Q. You was to lose it? A. That is the way I had it figured out. Q. And if you made the payment according to the terms, that was to apply on the purchase price of the farm? A. Yes, sir. We got possession of the farm March 3, 1908, when we got the deed. We paid the money and got the deed March 3, 1908. Rampton paid the taxes due the 1st of January, A. D. 1908. The place was rented for a year and we got possession subject to the one year lease. . . . We talked over the terms first at the house, and then with Henry Mohler when he drew the contract. \$900 was paid cash; the balance, the following March. Did not have the money on hand to pay for the farm. We borrowed a good part of it. We made arrangement to borrow the money to pay for the farm along in February. Did not make any arrangement in October, November, or December. Did not ask anybody to loan us money at that time. Q. When you signed this contract, you agreed to it, didn't you, to buy the farm? A. In one way we did; if we could not meet it, we had a right to forfeit that. Q. I am asking if in the contract you did not agree to buy the farm, and didn't Mr. Rampton agree to sell the farm to you? A. Yes, he did; but at the same time we had a right to forfeit. Q. I am asking if you did not agree to buy it by signing the contract. When you signed that contract, and your brother signed it, when you paid the \$900, it was your intention to carry it out, wasn't it? A. Yes, it was our intention. Q. You had no other intention? A. That was our intention. But at the same time, if we did not do it, we had a chance to forfeit the \$900 and let it go. Q. What was said about forfeiting the \$900 if you did not? A. If we didn't take the place, that was the last of it. Q. Who said that? A. I think the contract did. Q. Who else said that? Did Rampton tell you before the contract was written that was to be the understanding? A. It was the understanding between the three of us when he drew it up. Q. How did you reach that understanding? What was said about it? That is

what I want to know. A: Because he wanted some kind of a bond he would get something out of it if we didn't take it. Q. You had paid \$900, and he was to keep it if you didn't carry out the contract? A. That is the way I understand it. Q. But you intended at the same time always to carry out the contract? A. Yes, intended to if we could. Q. You know that if there had been a fire at any time after October 29, 1908, that you and your brother would have been entitled to the proceeds of the insurance policy, don't you? A. If we took the place. Q. You knew you would have been entitled to it? A. If we had took the place we would have; if we didn't, I don't suppose we would. Q. Didn't you understand this part in case insurance money was paid by reason of a fire having occurred in case it was paid to you at any time ahead of March 1, 1908, and you didn't take the farm, that you would pay all of the insurance money to Rampton, and he would keep your \$900, and you would be out the insurance money and be out the \$900, was that your understanding? A. That was the way I understood it, yes. Q. Did you have the money on hand with which to pay for the farm when the contract was signed? A. Had to borrow a large part of it in the spring. We figured on selling another place we had in Tama county, and didn't get that sold. In case we could not have borrowed or sold, we would have had to forfeit the \$900. There would have been no other way out of it.

This is the entire record, and it will be noticed that there is no testimony of any mistake in the drafting of the contract. The parties say it is just as they intended it to be, and about all they attempt to do in their testimony is to put a legal interpretation upon it. They say that, if the Milnes did not make the final payment, the \$900 was to be forfeited; but, if they did, it was to be part of the purchase price. They do not say, nor could they, that this was a mere option secured by the Milnes. As a legal conclusion, they say that Rampton could not have enforced anything but a forfeiture; but this legal conclusion is not binding upon us. There was a bind-

2. SAME: option
agreements.

ing contract of sale which Rampton might have enforced at any time by suit, or at his election, if the Milnes did not make the deferred payment—he could retain the \$900 and still keep his land. An option of the seller to enforce his contract or to rely upon a penalty for noncompliance is something quite different from an option on the part of the buyer. In the one case there is a sale or valid agreement to sell, and in the other a mere option on the part of the buyer to buy or to enter into a contract of purchase. An “option” is not an actual or existing contract, but merely a right reserved in a subsisting agreement. It is a continuing offer of a contract, and if the offeree decides to exercise his right to demand the conveyance or other act contemplated, he must signify that fact to the offerer. *Rivers v. Sugar Co.*, 52 La. Ann. 762, 27 South. 118; *Sizer v. Clark*, 116 Wis. 534 (93 N. W. 539). An option is not a sale. It is not even an agreement for a sale. At best it is but a right of election in the party securing the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. *Hopwood v. McCausland*, 120 Iowa, 218. “An option is nothing more than a continuing offer to sell; but until it is accepted it does not become a contract of sale, for it lacks the element of an agreement between the minds of the parties. It is only when there has been an acceptance of a proposal to sell that the vendee becomes in any sense the equitable owner of the subject-matter of the option.” *Milwaukee Mechanics’ Ins. Co. v. R. S. Shea & Son*, 123 Fed. 9, 11 (60 C. C. A. 103). “There is a decided distinction between an ‘option’ to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property; the sale to be completed within an agreed time. In the latter case the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and therefore

time is not of the essence of the contract; but where the contract is merely an option generally, without consideration, and especially as applied to mining property, of course time is of the essence." *Clark v. American Developing & Mining Co.*, 28 Mont. 468 (72 Pac. 978, 981), citing *Snyder, Mines*, section 1378.

The cases differ from *In re Shields*, 134 Iowa, 559, in that the parties to the contract both testified in that case that all they intended, understood, or agreed upon was an option, and that they so informed the scrivener, and supposed he had so written the contract. Upon their testimony a court of equity would have reformed their contract. Not so here. No court would have been justified, on the testimony adduced, in reforming the contract between Rampton and the Milnes. In so far as shown, it was written just as the parties intended, and all they ask the court to do is put such a legal interpretation upon the contract as they think it will bear. The *Shields* case does not hold that the contract is a mere option, but proceeds wholly upon the thought that, under the testimony, the parties intended to create a mere option, and that by mistake of the scrivener it was not so worded. The testimony in such a case should be clear, satisfactory, and conclusive, and of such import as to justify a reformation. That does not appear here. That the vendor might enforce the contract, notwithstanding the provision for forfeiture, is well established by the authorities. See *Wilcoxon v. Stitt*, 65 Cal. 596 (4 Pac. 629, 52 Am. Rep. 310); *Higbie v. Farr*, 28 Minn. 439 (10 N. W. 592); *Rourke v. McLaughlin*, 38 Cal. 196; *Mason v. Caldwell*, 5 Gillman (Ill.) 196 (48 Am. Dec. 330); *Moore v. Smith*, 24 Ill. 512.

The trial court correctly sustained the assessment.

The judgment should therefore be—*Affirmed*.

EVANS, J. (dissenting). I. I am of the opinion that the majority holding is in conflict with the former holding

of the court in the case *In re Shields Bros.*, 134 Iowa, 559. An examination of the opinion in the *Shields Bros.* case will not, in my opinion, justify the distinction which purports to be made in the majority opinion.

It so happens that, in the written contract in the case before us, the same blank printed form was used as was used in the *Shields Bros.* case, so that the two written contracts are identical in their general nature and in the form of their undertakings. Both parties to the contract involved in the present case testified as witnesses as to the real understanding between the parties to the contract. It is said in the majority opinion that this testimony is a mere interpretation of the written contract by the parties. If this be so, it is precisely what was contended for by the appellants in the *Shields Bros.* case, as will appear from the following statement of the issue as made in the opinion in such case: "Shields Bros. appeared before the treasurer pursuant to notice, and, in writing, objected to an assessment on the grounds: First, that the contract between the parties, as evidenced by the writing and by the facts and circumstances attending the making thereof, was not intended or understood to be a contract of sale, or one creating an absolute indebtedness; that, on the contrary, it was a mere option, giving Flynn the right to purchase in the future on the terms and conditions specified, and that it was so intended and understood by the parties thereto. Second, that an assessment based on said contract as an item of credit would result in double taxation. And it was upon the issues as thus outlined that the case was tried below and is now presented in this court." 134 Iowa, page 561.

It will be seen from the foregoing that the appellants in that case based their appeal upon the contract between the parties "as evidenced by the writing" and by the "facts and circumstances attending the making thereof." There was no claim made of a mistake in the writing. The parties to the contract were agreed in their construction of

it and acted upon such construction. And all this must be said also in the case at bar. The following comprises all the rest of the discussion and holding of this court in the *Shields Bros.* case:

The hearing was had in the district court as in equity, and on such hearing the appellants brought into the record proof of the circumstances attending the making of the contract. Each of the respective parties to such contract were called to the stand, and over objections as to competency, etc., testified that it was their understanding that a mere option to purchase was all that was in contemplation and being granted; that they informed the scrivener that such was their contract, and supposed he had so written. A contract rests in the intention of the parties thereto. It is true by general rule that, where the contract has been committed to writing, the nature and extent of the undertakings must be ascertained by an inspection of such writing. Oral evidence is not allowable to work a change or variance in the terms, conditions, etc., as fairly expressed by the writing. But this rule is enforced only where a controversy arises between the parties to the contract or their privies. As against a stranger to the contract, a party thereto may assert that the agreement was other or different—in any respect and to any extent—than that which the writing imports. *Livingstone v. Stevens*, 122 Iowa, 63; • *Logan v. Miller*, 106 Iowa, 511; *Roberts v. Bank*, 8 N. D. 474 (79 N. W. 1049); 11 Am. & Eng. Ency. 548, note; Page on Contracts, section 1196 et seq. Now, it may be doubted if the writing here in question imports a sale. In terms the agreement is for a sale, not an agreement of sale. There was to be no change in possession in virtue of the contract, and the appellants were to pay the taxes on the lands for the current year. Moreover, if Flynn failed to present himself on March 1st, following, and make payment etc., the money paid as of the date of the contract was to be regarded as forfeited, and all his rights should at once and without action on the part of appellants cease and determine. But however this may be, we must treat the contract as one granting only the right to exercise an option. The parties to it so intended and understood; and, as we have seen, all other parties are concluded from asserting

that it was other or different. And as against a stranger, it is not necessary that the writing be reformed in an action brought for that purpose before the real contract can be asserted and made the basis of a recovery or defense. *Logan v. Miller, supra*. Now, an option is not a contract to pay. It creates no enforceable indebtedness on the part of the person to whom it is granted. *Hopwood v. McCausland*, 120 Iowa, 218; Warvelle on Vendors, section 125. And, this being true, there can not arise out of such a contract a taxable credit within the meaning of the tax laws of the state. 134 Iowa, 561-563.

It will be noted from the foregoing that grave doubts were expressed by this court as to whether the form of written contract, adopted, amounted to anything more than an option. This only emphasizes the reasonableness of the attitude of the parties herein in putting an agreed construction upon the contract. There is no claim of fraud or collusion. The evidence on behalf of the appellee is undisputed and unimpeached either in its facts or its motive. The conduct of the parties with reference to the contract, after it was entered into, was consistent with their present claim, and that, too, in a very substantial and significant sense. The contract in question was entered into in October. Under the statute the taxes for the ensuing year became a lien upon the property on the last day of December. The appellant, as owner of the land, paid these taxes for which he was in no manner liable if the October contract amounted to a sale.

II. I disagree, also with some emphasis, with the last paragraph of the majority opinion. It is there held that the testimony in such a case as this "should be clear, satisfactory, and conclusive, and of such import as to justify a reformation." Such is the kind of testimony which must be produced in order to justify a reformation as *between the parties to the contract*. If the same rule is to be applied as between a party to the contract and a third party, then the distinction pointed out in the *Shields Bros.* case

is wholly ignored. It is there held especially that the existence of a written contract between two parties does not preclude oral evidence to contradict it as between one of the parties and a third party. Such oral evidence is admissible for the all-sufficient reason that the parties to the suit are not the parties or privies to the contract. It is not essential, in such a case, that it be shown that the written contract is reformable as between the parties thereto.

Of course, if any question of fraud or collusion were involved or if the evidence were conflicting, the court, as a trier of fact, might properly give greater weight to the written contract and find the facts in accord therewith. But no question of that kind is involved here. The appellee introduced no evidence in the court below and has submitted no argument here. I think, therefore, the case is ruled squarely by the former case.

I should have less objection to the majority opinion if the *Shields* case were frankly overruled therein. As between the two, however, I think the *Shields* case reached a more equitable result. The contrary holding is not wholesome in its practical operation. We can hardly fail to take judicial notice of the universal custom which obtains in the sale of farm lands, viz., that the contracts are always made with a view to consummation on the 1st of March following. December 31st usually intervenes between the date of contract and the date of consummation, and the practical effect of the present holding will usually result in double taxation.

For the reasons indicated, I respectfully dissent from the majority.

AMELIA CALDWELL, Appellee, v. IOWA STATE TRAVELING
MEN'S ASSOCIATION, Appellant.

Accident insurance: PROXIMATE CAUSE. Where death follows from
1 a disease, the natural though not necessary consequence of an
accidental injury, it may be deemed the result of the injury and
not of the disease; under the provisions of a policy requiring
that death must result solely from accidental means to create a
liability.

Same: ACCIDENTAL INJURY: BURDEN OF PROOF. The plaintiff, in an
2 action upon a policy providing liability for death, the result of
external, violent and accidental means, has the burden of show-
ing not only the death of the assured but also that it was caused
by such means. Proof, however, of the existence of the injury
will support a finding that the cause was violent and external,
without a showing of the circumstances causing it.

Same: ACCIDENTAL INJURY: PRESUMPTION. In the absence of direct
3 evidence on the subject it will be presumed that a personal in-
jury was not intentionally inflicted either by an assured or by
another; and this presumption is available as affirmative evi-
dence, from which the jury may infer that it was caused by acci-
dental means.

Instructions: REFUSAL OF REQUESTS. The refusal of requested in-
4 structions involving matters covered in those given by the court
on its own motion is not erroneous.

Appeal: REMARKS OF COURT: REVIEW. Remarks of the court urging
5 upon the jury the desirability of agreeing upon a verdict, to
which no exception was taken at the time, are not reviewable
on appeal.

Appeal from Jasper District Court.—HON. BYRON W.
PRESTON, JUDGE.

SATURDAY, JUNE 8, 1912.

THIS is an action upon a certificate of membership in

a mutual accident association. Under the terms and conditions of the certificate, \$5,000 became payable to the plaintiff, as beneficiary thereunder, in case of the death of the assured by external, violent or accidental means. The defendant answered with a general denial. It also pleaded affirmatively that the death of the assured was the result of bodily infirmity and disease. There was a trial to a jury, resulting in a verdict and judgment for the plaintiff for the full amount specified in the certificate. The defendant appeals.—*Affirmed.*

Sullivan & Sullivan, and W. O. McElroy, for appellant.

Hager & Parrish, and L. A. Wells, for appellee.

EVANS, J.—The assured was Walter E. Caldwell. He died on February 25, 1909. At the time of his death, he was a member of the defendant association. The plaintiff is his widow and the beneficiary of his insurance. Full compliance was had with all formal requirements preliminary to the suit. The controversy between the parties is wholly upon the larger merits of the case. The certificate provides for accident insurance only. The question at issue is: Was the death of the assured caused solely by external, violent or accidental means? The contention of the plaintiff is that on or prior to February 16, 1909, the assured received a slight accidental injury on his left cheek, causing a slight abrasion of the skin, and that this injury resulted in "traumatic erysipelas." It is undisputed that the immediate cause of the death of the assured was erysipelas, which was first developed on February 16th. It is the contention of the defendant that the evidence is wholly insufficient to sustain a finding that any accidental injury was in fact sustained by the assured, or that erysipelas was caused by such alleged injury. The trial court denied the

defendant's motion for a directed verdict, and this ruling is presented for our first consideration.

I. It must be said that there are weak places in plaintiff's chain of evidence. We think it must be said, also, that it was sufficient to make a *prima facie* case, and to

1. ACCIDENT
INSURANCE:
proximate
cause.

go to the jury as such. The attending physician of the assured testified to the discovery of the abrasion of the skin. He also testified

to his opinion that the disease from which the assured died was wholly infectious, and could not have resulted, except through infection of some wound or abrasion of the skin. He also testified that it made its first appearance at the edges of the alleged wound, and that in his opinion it resulted solely from the infection of such wound. This testimony was corroborated by other medical testimony. This evidence was sufficient to sustain a finding that the death of the assured was the proximate result of the wound or abrasion referred to. *Delaney v. Modern Accident Co.*, 121 Iowa, 528; *French v. Fidelity Insurance Co.*, 135 Wis. 259 (115 N. W. 869, 17 L. R. A. (N. S.) 1011.)

No direct evidence was introduced to show any of the circumstances which caused the wound or abrasion. It was apparently very slight, and would of itself have

2. SAME: acci-
dental injury:
burden of
proof.

attracted little attention. Only its existence is shown by direct evidence. How and when it was inflicted does not appear. The burden

was at all times upon the plaintiff to show, not only the death of the assured, but that it was caused by violent, accidental, and external means. *Taylor v. Pacific Mutual Life*, 110 Iowa, 621. The appearance of the wound would clearly support the finding that the cause of the wound was violent and external. *Jenkins v. Hawkeye Commercial Association*, 157 Iowa, 113.

II. The remaining question is: Did the assured receive his wound through accidental means? It has been

repeatedly held that, in the absence of direct evidence on the subject, a presumption arises that the wound was not intentionally inflicted either by the assured or by another. This presumption is almost the equivalent of a presumption that the wound was inflicted through accidental means. The authorities, however, stop short of announcing the presumption in this latter form. They do hold, however, that the presumption first stated is available to the plaintiff as affirmative evidence; and that an inference may be drawn therefrom by the triers of fact that the wound was caused by accidental means as the only other alternative. *Jones v. Insurance Co.*, 92 Iowa, 654; *Connell v. Iowa State Insurance Co.*, 139 Iowa, 444; *Travelers' Insurance Co. v. McConkey*, 127 U. S. 661 (8 Sup. Ct. 1360, 32 L. Ed. 308); *Cronkite v. Travelers' Insurance Co.*, 75 Wis. 116 (43 N. W. 731, 17 Am. St. Rep. 184); *Freeman v. Insurance Co.*, 144 Mass. 572 (12 N. E. 372); *Aetna Life Insurance Co. v. Milward*, 118 Ky. 716 (82 S. W. 364, 68 L. R. A. 285, 4 Ann. Cas. 1092); *Preferred Accident Co. v. Fielding*, 35 Colo. 19 (83 Pac. 1013, 9 Ann. Cas. 916).

The defendant presented to the trial court fifteen requested instructions, all of which were refused, and complaint is made of such refusal. Most of the ground covered in such fifteen instructions was included in the instructions given by the trial court on its own motion and in substantial accord with the requested instructions. The requested instructions, however, pointed out the distinction between "accidental death" and "death caused by accidental means," and this distinction was not presented to the jury by the trial court. Clearly there may be a distinction in a given case between an "accidental death" and a "death by accidental means." The case of *Carnes v. Insurance Association*, 106 Iowa, 281, furnishes an illustration of such distinction. In the case before us, however, there was nothing in the record to call

3. SAME:
accidental
injury:
presumption.

4. INSTRUCTIONS:
refusal of
requests.

for an instruction upon that subject, and the trial court properly refused it.

III. After the jury had been deliberating upon their verdict many hours, and had failed to agree, they were brought into court. Some remarks, were made by the trial judge, urging upon the jury the importance of their reaching an agreement, if they could.

5. APPEAL:
remarks of
court:
review.

These remarks were quite extensive, and they were set out in the record. Strenuous complaint is made of them, on the ground that they amounted to coercion. The state of the record will not justify our passing upon this contention. The remarks were made in the presence of counsel for both parties. It could not be known to whose advantage such remarks might operate. Counsel made no objection or exception thereto at the time. If they were improper, their impropriety was as manifest then as later. It is true that written exceptions to a portion of the remarks of the court were included in the motion for a new trial after the verdict. The remarks therein complained of are quite within the limits permitted in *State of Iowa v. Richardson*, 137 Iowa, 591. Other minor points are discussed by appellant; but we find no error in the record.

The judgment below must therefore be,—*Affirmed*.

ELIZABETH KNAUSS, Appellant, v. OTTO GRUENWALD,
Appellee.

Intoxicating liquors: NUISANCE: PLEADING: MORE SPECIFIC STATEMENT.

Generally the keeping of intoxicating liquor with intent to sell the same as a beverage is presumptively in violation of the law and constitutes a nuisance; and a petition alleging such facts is not subject to a motion for a more specific statement, though accompanied by an affidavit stating that the mulot law was in force and defendant was conducting a saloon thereunder.

Appeal from Scott District Court.—HON. WILLIAM THEOPHILUS, JUDGE.

SATURDAY, JUNE 8, 1912.

SUIT in equity to enjoin a liquor nuisance. A motion by defendant for more specific statement was sustained. The plaintiff elected to stand upon her petition and refused to amend, whereupon the court dismissed her petition, and she appeals.—*Reversed.*

Betty & Betty, for appellant.

Theunen & Shorey, for appellee.

EVANS, J.—The petition charged the defendants with a maintenance of a liquor nuisance as follows: "Paragraph 2. That the defendants, Otto Gruenwald and August Zoller, have erected and are maintaining a liquor nuisance in a building situated on a part of the southwest quarter of section 33, township 78 north, range 3 east of the fifth P. M., being two and one-half acres in the southwest corner of the southwest quarter of said section, Scott county, state of Iowa, wherein they keep for sale and sell in violation of law intoxicating liquor as a beverage, to wit, ale, beer, wine, whisky, and other intoxicating liquor, and have then and there erected and are maintaining a nuisance as aforesaid." The principal defendant appeared and filed a motion for more specific statement asking that the plaintiff be required to state in what particulars the defendant was violating the law in the sale of intoxicating liquors and in the maintenance of the alleged nuisance. This motion was supported by an affidavit showing that the mulct law was in force in Scott county, and that the defendant was operating a saloon thereunder, and setting forth in detail a full compliance with every requirement of the statute in

question. No counter showing was offered by the plaintiff as against such affidavit, and the motion for more specific statement was sustained.

It is the contention of the appellant that her petition was sufficient in its allegations to show the existence of the nuisance, and that the burden was upon the defendant to plead and to prove its alleged defense, and that the trial court had no power or discretion to require a more specific statement from the plaintiff. The question now considered arose when the plaintiff applied for temporary writ of injunction. Generally speaking, the keeping of intoxicating liquors in a place with intent to sell the same as a beverage is presumptively in violation of the law and constitutes a nuisance.

It is the contention of appellee that the facts set forth in his affidavit in question were sufficient to overcome such presumption, and that such facts rendered defendant's conduct consistent with the law, in the keeping of intoxicating liquors with intent to sell the same as a beverage. The appellee defendant's motion and affidavit conformed to section 3630 of the Code.

If it were a question of first impression, the writer hereof would be inclined to sustain the action of the trial court as within the fair limits of judicial discretion and in the interest of orderly procedure. But the question is quite foreclosed by our previous holdings. *Abrams v. Sandholm*, 119 Iowa, 583; *Pumphrey v. Anderson*, 141 Iowa, 140.

The order of the trial court must therefore be,—
Reversed.

WM. GERLACH, v. GRAIN SHIPPERS MUTUAL FIRE INSURANCE ASSOCIATION, Appellant.

Insurance: RIGHTS OF INSURER: SUBROGATION. Where insured property is burned because of the wrongful act of a third person,

the insurer, upon paying the indemnity, is entitled to be subrogated to the rights of the insured against the wrongdoer; and this right does not depend upon any such condition in the policy. But the insured in leasing property may release the lessor from any liability for injury resulting from the lessor's negligence, and this will deprive the insurer of the right of subrogation.

Same. Where the lessee of property released the lessor from all liability in case of loss from fire, and subsequently insured the same, notifying the company of the lease but not of the release provision, and the policy provided that in case of loss through the negligence of any person, the insurer, upon payment of the same, should be subrogated to that extent to all the rights of the insured: *Held*, that upon destruction of the property through the negligence of the lessor the provision releasing it from liability did not avoid the policy; as the contract for subrogation only extended to such rights as the insured had, and was not a covenant as to any right whatever.

Same: ADJUSTMENT OF LOSS: EFFECT. Under the foregoing circumstances a tender to the plaintiff by the insurance company of the full amount of its liability, on the one condition that plaintiff assign his cause of action against the party through whose negligence the loss occurred, and acceptance with a written tender of the assignment, constituted an adjustment of the loss binding upon both parties, in the absence of fraud or mistake, regardless of any defenses which may have existed in favor of the company.

Appeal from Taylor District Court.—HON. H. M. TOWNER, JUDGE.

SATURDAY, JUNE 8, 1912.

ACTION on two insurance policies resulted in judgment as prayed. The defendant appeals.—*Affirmed*.

Johnston Bros. and Frank Wisdom, for appellant.

W. M. Jackson, and J. M. Junkin, for appellee.

LADD, J.—Plaintiff became a member of the defendant, a mutual assessment insurance association organized

under the laws of Iowa, and received from it two policies of insurance covering the same property, one April 26, 1909, for \$3,000, and the other November 22d of the same year, for \$2,000. This property burned April 6, 1910, during the life of these policies and it was conceded on the trial that the loss exceeded the amount of both, and that timely proofs of loss in due form were furnished the defendant; that insured's property was on ground along the tracks of the Chicago, Burlington & Quincy Railroad Company leased by that company to the plaintiff, the lease containing the following stipulation: "The lessee further agrees to cause during the continuance of this lease, and any extension thereof, the policies of fire insurance on the said grain elevator, corncribs and coal sheds and other improvements upon the demised premises, and upon contents thereof to be so written that in the event of any destruction or damage by fire, no insurance company shall have recourse against the railroad company." The written application for insurance disclosed that the property was on leased ground, but not the terms of the lease, and each policy provided that: "If this association shall claim the fire was caused by the act or neglect of any person or corporation, private or municipal, this association shall, on payment of the loss, be subrogated to the extent of such payment to all rights of recovery by the insured for the loss resulting therefrom, and such rights shall be assigned to this association by the insured on receiving such payment. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured of all the foregoing requirements."

The plaintiff sued on the two policies, and also based his claim for judgment on an alleged adjustment of the loss. The defendant denied liability, for, as it alleged, the fire which consumed the property was set out by the above-named railroad company, and plaintiff, by the clause in the lease quoted, had breached the condition of the policy

set out before the loss; and also defendant had tendered the full amount of the policies on "condition plaintiff would assign to defendant a right of action against said railroad company," which plaintiff was unable to do because of having released it from liability. Subsequently plaintiff offered in writing a written assignment of any cause of action he had against the railroad company, but this was not accepted. The trial court found:

As a matter of law, the defendant company was bound by the terms and conditions of the lease at the time that it accepted the application and issued the policies of insurance. Knowing that the said property was upon leased ground and held by leasehold right, it made no investigation as to what were the terms of the lease, and accepted the application and issued the policies without making further investigation. Under these circumstances, in law, it ought to be bound by the terms of the lease. The right of subrogation is not a right that insures the recovery upon any claim that may be made, but is merely the right to substitute the defendant for the plaintiff, as to the rights that he might have in and to the claim for damages against the railroad company occasioned by their negligence. There being no proof that the fire was occasioned by the railroad company's negligence, that there would have been a right of recovery if prosecuted, and the defendant having failed to comply with the conditions which are conditions precedent to their right of subrogation, namely, the payment of the loss, and the plaintiff having at all times held himself in readiness to grant them every right which he might have had against the railroad company in accordance with the provisions of the said contract of insurance, there is no forfeiture of the plaintiff's right of recovery as against the defendant upon the said policies of insurance. The claim and loss for insurance, having been fully settled and adjusted by the parties upon a written agreement which was entered into by them, consisted of a proposition by the defendant and an acceptance by the plaintiff, is binding upon the association, and the plaintiff is entitled to recover thereon.

There was considerable parley as to plaintiff prosecut-

ing an action against the railroad company, but no agreement was reached, and subsequently defendant, with knowledge of the clause in the lease, made written tender in words following:

To William Gerlach: Whereas you are the holder of policy 35186 of the Grain Shippers' Mutual Fire Insurance Company and 31998 for five thousand dollars (\$5,000) covering property at Sharpsburg, Iowa, said property being elevator and grain and lawn swing factory, and whereas you sustained a loss on said property which the insurance company are claiming was caused by the C. B. & Q. Railroad, through negligence and allowing sparks from their engine to come in contact with the property, and whereas under the terms of the policies above referred to the company upon making such claim is entitled to subrogation of your right to recover against the railroad up to the amount of insurance paid, whereas subrogation is to be due upon the payment of the loss: We hereby tender to you the sum of five thousand dollars (\$5,000), the amount due on the policies above referred to, and demand subrogation of you to your right of recovery against the C. B. & Q. Railroad for negligently setting the fire. Grain Shippers' Mutual Fire Insurance Association, by Johnston Bros.

On the next day, this offer was accepted in a letter addressed to defendant, saying: "I hereby accept that offer on the part of Mr. Gerlach, and assure you that we are ready to assign to you our cause of action against the railroad, to the extent of the amount which you pay, and immediately upon the receipt of this amount we will execute a written assignment providing you think a written assignment is necessary to be made from him. Respectfully yours, Wm. Gerlach, by W. M. Jackson, His Attorney."

Had the property been consumed by a fire set out by the railroad company, its liability would have been primary, and the liability of the insurance company in the nature of that of a surety. Upon payment of indemnity by the

latter, it would be entitled to all the remedies of the insured.

1. INSURANCE:
rights of
insurer:
subrogation.

This "right is based upon the equitable doctrine that where one has been obliged to pay money to another, by the nonfeasance or misfeasance of a third, who, being at fault, ought to bear the loss, the party so paying, as by his direct obligation towards the party suffering the loss he may be compelled to do, shall be allowed indirectly, and through the right which the injured party had, to compel the wrongdoer to bear the burden which was imposed by his fault, although between him and the wrongdoer there is no direct relation upon which to found a cause of action.

. . . The liability of the wrongdoer is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. And where the (party) insured insists upon his remedy against the party secondarily liable, he is conscientiously bound to make an assignment in equity to the person entitled to the benefit, and the acceptance of the indemnity from the insurers is in the nature of an equitable assignment which authorizes the assignor to sue in the name of the assignee for his own benefit." May on Ins. section 454.

Even in the absence of any provision such as contained in this policy, the insurer, upon the payment of loss, is entitled to be subrogated to the cause of action of the insured against the wrongdoer. *Rockingham Mut. Fire Ins. Co. v. Bosher*, 39 Me. 253 (63 Am. Dec. 618); *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584 (4 Sup. Ct. 566, 28 L. Ed. 527); *Hart v. Western R. R. Co.*, 13 Metc. (Mass.) 99 (46 Am. Dec. 719).

But it is competent for the insured in leasing property to release the lessor from obligation for any injury the lessor may occasion by his negligence. *Griswold v. Railroad Co.*, 90 Iowa, 265; *Hartford Fire Ins. Co. v. Railroad*, 175 U. S. 91 (20 Sup. Ct. 33, 44 L. Ed. 84). And, of course, the insured having released the wrongdoer, this

will deprive the insurer of the benefit of subrogation. *Home Ins. Co. v. Railroad Co.*, 19 Colo. 46 (34 Pac. 281); *Packham v. Ger. Fire Ins. Co.*, 91 Md. 515 (46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. Rep. 461); *Platt v. Railway Co.*, 108 N. Y. 358 (15 N. E. 393).

Courts have frequently held that where goods in transit are insured by a policy stipulating that the insurance company, in event of loss, shall be subrogated to all claims against the carrier, and the goods are lost while being shipped under a bill of lading which provides that, in event of loss by which the carrier has incurred any liability it should have the benefit of any insurance which might have been effected on the goods, the insured can not recover against the insurance company because of having defeated the right of subrogation against the carrier to which the insurance company was entitled. *Carstairs v. Insurance Co.* (C. C.) 18 Fed. 473; *Fayerweather v. Insurance Co.*, 118 N. Y. 324 (23 N. E. 192, 6 L. R. A. 805); *Southard v. Railway Co.*, 60 Minn. 382 (62 N. W. 442, 619). But see *Jackson Company v. Insurance Co.*, 139 Mass. 508 (2 N. E. 103, 52 Am. Rep. 728); *Inman v. Railway Co.*, 129 U. S. 128 (9 Sup. Ct. 249, 32 L. Ed. 612).

In *Kennedy Bros. v. Insurance Co.*, 119 Iowa, 29, a crib with corn therein and some agricultural implements burned, and the policy covering the same, in addition to stipulating for subrogation to all of the rights of the insured against the wrongdoer, provided that the entire policy shall be void "if the insured shall make or have any contract or understanding whereby any person or corporation shall not be liable for any act or neglect in causing the fire." The premises were leased from a railroad company stipulating that "the risk of all loss, injury, and damages by fire, however caused, being assumed by the said lessees, who in consideration of the leasing of said premises agree to indemnify and save the said lessor harmless from all

liability for damage by fire, however the same may originate." This did precisely what the policy declared would render it void, and, though the decision proceeds on the theory that the insured by releasing the wrongdoer breached the condition promising subrogation in event of loss, was enough to defeat recovery.

In *Downs Farmers' Warehouse Ass'n v. Insurance Co.*, 41 Wash. 372 (83 Pac. 423), a condition of a policy, expressly providing for subrogation of the insurer to the rights of the assured against any person responsible for the loss, was held to be breached by the insured after the issuance of the policy contracting in the lease from a railroad company to release it from liability for any loss of goods that might be caused by it.

In *Niagara Fire Ins. Co. v. Fidelity Title & Trust Co.*, 123 Pa. 516 (16 Atl. 790, 10 Am. St. Rep. 543), an affidavit, setting up that the policy provided that upon payment of the loss the insured would assign his cause of action against the party whose act or omission caused the same to the company, and that upon tender such assignment had been refused, and that the insured had settled with and released the gas company by whose negligence the loss was caused, was held to set up a good defense. See cases collected in note to *Brown v. Insurance Co.*, 83 Vt. 161 (74 Atl. 1061, 29 L. R. A. (N. S.) 698).

The principle is clearly stated in 2 Wood on Fire Ins. (2d Ed.) section 500, where the author says: "The law is well established that an insurance company which has been compelled to pay, or has paid, a loss covered by its policy, has, after such payment, a right of action against the person who wrongfully caused the fire and loss to the amount such insurance company paid even without any formal assignment by the assured of his claim against the party primarily liable. And the courts have likewise been very firm in supporting the right of the insurance company to bring an action in the name of the assured, and will not

allow the latter to defeat such action even by a release or discharge of the person by whose act the damage was occasioned."

A policy of insurance with or without a clause such as is contained in the policies in suit is merely a contract of indemnity. Upon payment of the loss, the insurer is entitled to subrogation to all the rights the assured may have against any other person or corporation causing the fire to the extent of such payment, and, where subrogation has been stipulated in the policy as a condition of recovery, the subsequent voluntary release of the wrongdoer by the assured is a breach of the condition of the policy which will defeat recovery thereon. But this is as far as any of the authorities, save *Kennedy Bros. v. Ins. Co., supra*, have gone, and aside from what is there said, we have discovered no decision lending support to appellant's contention that a condition in the lease waiving liability of the lessor's negligence in event of fire will invalidate a contract of insurance containing a condition such as in these policies, subsequently entered into. Nor is this proposition sound in principal. The insured did not agree, in accepting the policies, that the insurer should be subrogated to any rights other than he might have. The property was on leased ground, as the insurance company well knew. The lease antedated the policies, so that the status of the property was precisely the same at the time of the fire as when the policies were issued. It is not pretended that the insured misrepresented the risk, nor is there any charge of fraudulent concealment. Indeed, the insurance company made no inquiry concerning the conditions contained in the lease, and, not being called upon, the insured gave no information concerning these. All the insured undertook was that the insurance company upon payment of the loss should be subrogated "to all rights of recovery by the insured for the loss resulting therefrom," and that he would assign these. He did not undertake that there should be any right or

cause of action on his part on which the company might maintain an action, even though it were subrogated to any rights which he might have, nor did he give any assurance that there would be a claim or cause of action which might be assigned. The obligation was simply that the insurer should succeed to any rights the insured might have upon the payment of the loss, and if he had no right or cause of action against the wrongdoer, then there was nothing to be subrogated to. The most that the insurance company could insist upon was that it be put in as favorable a position as the insured—in other words, stand in his shoes—in maintaining an action against the railroad company, and this was the extent of his obligation. Manifestly, then, there was no breach of condition contained in the policies of insurance.

As heretofore observed, *Kennedy Bros. v. Insurance Co.*, *supra*, was rightly decided. But there is some language in that decision inconsistent with what is here said, and, in so far as inconsistent herewith, must be regarded as overruled.

The parties hereto appeared to have proceeded on this theory, for after failing to arrange for suit by the assured against the railroad company, the defendant, with knowledge of the contents of the lease, tendered in writing the full amount of the policies to plaintiff upon assignment of his cause of action against the railroad company with no other condition, and the latter within a reasonable time, and before the tender was withdrawn, notified defendant of his acceptance, and later made written tender of such assignment. This amounted to an adjustment of the loss binding on the parties. *Ill. Mutual Fire Ins. Co. v. Archdeacon*, 82 Ill. 236 (25 Am. Rep. 313); *Stache v. Insurance Co.*, 49 Wis. 89 (5 N. W. 36, 35 Am. Rep. 772); *Smith v. Insurance Co.*, 62 N. Y. 85; Phillips on Ins. section 1815.

In 1 Park on Ins. 266, the author says: "It has been

3. SAME:
adjustment
of loss:
effect.

determined that after an adjustment has been signed by an underwriter, if he refuses to pay, the owner has no occasion to go into proof of his loss or any of the circumstances respecting it. This it is said has been the invariable custom on the subject. It seems to be perfectly just, as the underwriter has, under his hand, expressly admitted that the plaintiff has sustained damage to a certain amount."

By the offer and acceptance, the parties voluntarily agreed upon the precise amount one was to receive and the other to pay in adjustment of the loss, and, in the absence of any charge of mistake or fraud, they are bound by their agreement, regardless of any defenses which may have existed in favor of the company.

Whether the insurer was charged with knowledge of the condition in the lease need not be considered. The judgment is,—*Affirmed*.

CEDAR RAPIDS NATIONAL BANK, Appellant, v. E. O. CARLSON, ANDREW HANSON, J. C. GROON and JOHN B. DIRKS.

Evidence: VARIANCE BY PAROL. Where an instrument is not relied upon as the basis of an action or defense, but is a mere collateral instrument of evidence, contradiction of its terms by parol is admissible, notwithstanding the parol evidence rule. Thus where a party relied upon a contract to show that certain notes were binding upon the makers though they did not contain the names of all who signed the contract, and also to rebut an inference that the notes were not to be delivered until a certain number of signatures were obtained, evidence that those signing the contract had been misled in doing so, without knowledge that the same was a contract, was admissible to destroy the probative effect of the instrument, although no fraud in procuring their signatures was alleged.

Same. Where an instrument does not specify the number of signers to be procured, nor the liability of each, evidence of an oral

agreement that the same was not to become binding until a specified number of signers was obtained, was not a variance of the instrument; and was provable by parol as a condition precedent to the effectiveness of the instrument.

Explanatory evidence. In a suit upon notes in which the plaintiff relied upon a contract by the makers and others for the purchase of a horse, and defendants alleged that there was an oral agreement that the payee was to secure the signatures of a certain number of solvent persons to the agreement of purchase, when the notes provided for in the contract should be executed and delivered, and also alleged that many of the signers were insolvent, evidence that one of the signatures had been erased was not erroneously admitted, where the instrument still contained the requisite number of names; as the same was simply explanatory of the fact that at one time it contained more names than when introduced in evidence.

New trial: MISCONDUCT: ARGUMENT: REVIEW. Upon refusal of the court to permit an amendment pleading a material alteration in a contract, consisting merely of a collateral instrument, argument of counsel to the jury that the alteration vitiated the contract was improper; but as the exception to the argument in this case was not ruled upon by the trial court no error in this respect was presented for review on appeal. And although such misconduct was made a ground of a motion for new trial and an exception taken to the overruling of the motion, still as no error in overruling the motion is relied on in argument such misconduct is not ground for reversal.

Evidence: EXAMINATION OF WITNESSES. Although the court may inadvertently strike out answers of a witness containing matter not vulnerable to the objection raised, still the complaining party should by further questions call for such answers as are not objectionable, to be heard on appeal.

Same: EXAMINATION BY THE COURT. The presiding judge may rightfully participate in the examination of witnesses, if by so doing he can expedite the trial or assist the witness; but to make a practice of thus interfering with the examination of witnesses is unwise.

Same: EXCLUSION OF EVIDENCE: HARMLESS ERROR. Where the court instructed the jury that pleadings in another case offered in evidence should not be considered, refusal to permit a witness to explain the cause for dismissal of such action was not prejudicial; as it will be presumed that the jury followed the court's instruction.

Negotiable instruments: DELIVERY: EVIDENCE. Where the evidence 8 showed that the notes in suit were delivered to a third person to be held by him until the seller of property for which they were given had performed the conditions of sale, evidence of a voluntary payment by the seller of the third person's services, and acceptance by him, was not competent to show that the seller had performed his obligations and that defendant regarded the transaction as completed at that time.

Same: INSTRUCTIONS. Where the defense pleaded to a suit upon 9 notes was an oral agreement that the notes were not to be delivered until a certain number of responsible persons had signed the same, and there was evidence of an oral and also a written agreement to that effect, but no complaint was made during the trial of a variance between the allegations and the proof, and the court correctly stated the issues and instructed on the burden of proof, failure to instruct on the oral agreement alone was not misleading.

Contracts: CONSTRUCTION: EVIDENCE. Where the evidence is con- 10 flicting as to the terms of an oral agreement and the language of a lost writing on the subject, it is competent to show the interpretation put upon the agreement by the parties themselves, and to take into consideration their understanding of the terms and effect thereof, in determining the real agreement; and it is proper for the court to instruct in accordance with the terms of the statute, that the sense is to prevail against either party to an agreement in which he had reason to suppose the other party understood it.

Appeal from Linn District Court.—HON. MILO P. SMITH,
JUDGE.

SATURDAY, JUNE 8, 1912.

ACTION to recover the amount due on two promissory notes, dated December 15, 1903, each for \$800, and payable July 1, 1905, and July 1, 1907 respectively to the order of Henry Lefebure signed by the four persons named as defendants in the title of the action, as above given, and others. Plaintiff alleged that it became the holder of said notes for value and in good faith, before maturity, without any notice of defenses thereto. The other signers of the

notes were named as defendants; but, not being served with notice of the action, they need not be enumerated. The four defendants who were served within the state answered, denying that plaintiff became the holder of the notes for value before maturity, and by way of defense to the notes, which are conceded to bear their signatures, alleged that neither of the notes sued on was ever delivered to the payee named therein, or to any other person for him, and further alleged that the notes were executed in connection with and as the result of an oral agreement between the payee, Lefebure, and the signers of the notes with reference to the purchase of a stallion by said defendants from said Lefebure, it being a part of such oral agreement that neither of said notes should be delivered to said Lefebure until the full number of twenty-four solvent and responsible persons living in the vicinity had signed said notes; that said Lefebure secured the signatures of twenty-five persons to a written agreement to purchase said stallion, but that many of said signers were not solvent and responsible, which fact the said Lefebure well knew; that when said Lefebure had obtained the signatures to the notes of said defendants and others, in all nineteen in number, said Lefebure and his agent, one Headley, designedly, falsely, and fraudulently represented to defendant Carlson, who was the custodian of the notes in behalf of the persons who had already signed the same, that the said Lefebure and said Headley desired to examine said notes in order to make a list of those persons who had contracted to purchase the stallion and had not yet signed the notes, and that when said notes were then shown upon said request the said Headley unlawfully, fraudulently, and without any authority from these defendants or other signers, stole said notes and absconded with them, and thereafter delivered them to Lefebure, who thereupon pretended to sell and transfer them to plaintiff. In reply, the plaintiff acknowledged that said Headley was agent for Lefebure in relation to the sale

of the stallion, and denied all other allegations of the answer. By way of cross-petition, the defendants, above referred to, alleged the fraud and misconduct of said Lefebure and his agent, Headley, as a cause of action against said Lefebure, asking that he be made a party defendant, and charging him with transferring the notes to plaintiff bank for the purpose of defeating the defense thereto, and asking judgment against him in any amount in which the said defendants should be held liable on the notes to the plaintiff. Thereupon Lefebure filed an answer to the cross-petition and further asked, by way of counterclaim, that he have judgment against the other defendants for the amount of their indebtedness on the notes for the benefit of the plaintiff in this action.

In his instructions to the jury, the court eliminated said Lefebure as a party from the case, and instructed solely with reference to the issues as between the plaintiff and the four defendants originally named, and the jury returned a verdict for said defendants. From a judgment on this verdict, both the plaintiff and said Lefebure, who had been made a defendant on the cross-petition of the answering defendants, appeal; the plaintiff assigning errors in the rendition of judgment against it, and Lefebure assigning error in the action of the court eliminating him from the case as a party. These two appeals are argued together; but in the view which we take of the case it will be unnecessary to consider the appeal of Lefebure, and in the opinion he will not be referred to as a defendant.—*Affirmed.*

Deacon, Good, Sargent & Spangler, and Voris & Haas,
for appellant.

*Erickson & Stickney, and John Reed, and Tourtellot
& Donnelly,* for appellees.

McCLAIN, C. J.—For the purpose of effecting the sale

of a stallion for \$2,400, one Lefebure, who is the payee of the notes sued on in this action, through his regularly employed agent, Headley, and two or three local assistants secured for the purpose, attempted to find twenty-four persons of the vicinity in which the negotiations were carried on to obligate themselves, in writing, to join in the purchase of such horse. After these negotiations had been for some time in progress, those who had taken an interest in the matter met on December 15, 1903, at the house of defendant Carlson, who had been assisting in the promotion of the enterprise. Lefebure was present at this meeting, and there is evidence tending to show that the full number of persons required to join to effect the purchase at the rate of \$100 each had not yet been secured. At this meeting arrangements were proposed for securing signatures to notes bearing that date, and it was stated that the notes (which were three in number, each for the sum of \$800, although only two such notes were involved in this suit), signed by those who were present, should be left with Carlson until the purchase of the horse was finally concluded. There is evidence tending to show that, on objection being made by some to signing the notes until the full number of purchasers was secured, Lefebure executed and delivered to some one a written agreement or guaranty that the notes would remain in Carlson's possession until the transaction was completed. The loss of this instrument was accounted for; but its contents were very indefinitely shown. It appears further that the proposed purchasers entered their names in a little book on a paper contained therein. The names had been written in the book as the canvass progressed. On December 22d following, another meeting was called at Carlson's house, for the purpose of in some way completing the transaction, at which some, but not all, of the proposed purchasers were present. At this meeting, Lefebure was not present; but his general agent, Headley, delivered to Carlson the little red book

purporting to contain twenty-four signatures, and took from Carlson the notes, to which were affixed the signatures of only nineteen of the twenty-four persons whose names were in the book.

The theory of plaintiff is that those who had entered their names in the book had become bound as purchasers of the horse, and that the notes were binding obligations of the signers thereof, if Lefebure elected to accept the notes as they then were; while the theory of defendants is that the notes were not to be delivered until the names of twenty-four responsible persons were signed to them, and that Headley, having taken the notes from Carlson into his own hands for the ostensible purpose of copying off the names of the signers, wrongfully retained the notes in his possession and carried them away with him, with the result that no legal and effectual delivery of the notes was ever made; Carlson having authority to deliver the notes on this theory only when they bore the names of twenty-four signers.

As the paper contained in the little red book on which twenty-four persons had entered their names, on which paper was printed a blank contract, the blanks filled out by or for Lefebure, and his name attached to it as party of the first part, was received in evidence without objection and admitted on both sides to be material evidence in the case, we may here briefly describe it. It consists of a cover of about the usual size of a pocket memorandum book, hinged at the top, into which is held, by a rubber band, a piece of paper of approximately the same size as the cover when open; the included paper having a blank contract so printed upon it that, as the paper is folded in the book, the printing faces the back cover. The blank portion of the paper facing the front cover contains lines for signatures, and on these lines, as well as on the back portion of the sheet, which is entirely blank, the names of these defendants and others signed are in pencil. As the

exhibit is before us, one opening the book from the front would see only printed lines for signatures, and would not see the printed contract. As the sheet is held in the book only by a small rubber band, and might have been so placed as that the contract and first signatures would appear when the sheet was opened, we should not attach much importance to the particular adjustment of the sheet and the place of the signatures, were it not that many of the signers testify as witnesses that their signatures were entered without any knowledge on their part of any printed contract. The contract as printed with blanks filled in, so as to show the date to be November 18, 1903, and the obligation of the subscribers to be to purchase a Belgian stallion, named Bristol, for \$2,400, payment to be made in cash upon delivery to any of the signers, or, at their option, by their joint and several negotiable note for said sum, payable in three annual installments, concludes with this sentence: "If any of the second parties shall refuse to sign said note, first party may, at his option, accept the note as signed without waiving any rights hereunder against said parties who shall refuse to sign such note, and may proceed to enforce collection against such parties who shall refuse to sign, without proceeding against or joining the parties who have signed."

By reference to the statement of the issues already given, it will appear that what purports to be a contract contained in the little red book cover is not pleaded or relied upon in the pleadings by either the plaintiff or the defendants, and that there are no allegations of fraud perpetrated by Lefebure or his agents upon the signers of such contract.

I. When the attention of witnesses testifying for defendant was called to the written contract contained in the little red book, which contract is referred to throughout the record as Exhibit C, they were allowed to testify, over appellant's objection, that it was so represented to them in

the book that they did not see the printing, and supposed they were entering their names on a blank piece of paper as persons who would become purchasers of the horse, if a sufficient number of purchasers was secured. The objection to such testimony was that it tended to show fraud in procuring signatures to Exhibit C, although no allegations of fraud with reference to this contract were found in the pleadings. Furthermore, the testimony of some of these same witnesses as to the terms on which they were solicited to become purchasers was admitted over the objection for plaintiff that the written contract was the best evidence of the agreement between the parties, and the testimony as to prior negotiations should be excluded. The contention for the appellant that the court erred in these rulings is without merit. Exhibit C was a material piece of evidence, and the circumstances under which it was signed might properly be testified to by those who signed it. But it was not the basis of the action. Fraud in procuring it was not relied upon in the pleadings; and there was no occasion to invoke the rule that fraud must be pleaded, or the other rule that oral evidence is not admissible to contradict the terms of a written instrument. It is well settled that the latter of these two rules has no application, where the instrument referred to in the testimony is not relied upon as the basis of the suit or defense, but is a mere collateral instrument of evidence. *Livingstone v. Stevens*, 122 Iowa, 62; *In re Assessment of Shields*, 134 Iowa, 559; *Aultman, etc., Co. v. Greenlee*, 134 Iowa, 368.

Exhibit C was relied upon by appellant to show that the notes in the suit were obligatory on the signers, although they did not bear the signatures of all the persons who had signed the contract, and as tending to rebut the evidence of an oral or written arrangement that the notes themselves should not be delivered until the names of twenty-four persons had been procured thereon. For the purpose

1. EVIDENCE:
variance
by parol.

of destroying the probative effect of Exhibit C, it was certainly competent to introduce evidence that the signers had been misled in placing their names on a piece of paper, without knowledge that it purported to be a contract. If it was not in fact a contract binding upon the signers, then its probative effect for the purpose for which it was offered was destroyed. See, by way of illustration, *Sutton v. Weber*, 127 Iowa, 361; *Brennecke v. Heald*, 107 Iowa, 376; *Hallowell v. McLaughlin*, 136 Iowa, 279.

It is to be noticed that the contract, Exhibit C, does not specify the number of signers to be procured, nor the amount which each was to pay in the purchase of the horse. Therefore evidence of an oral agree-

2. SAME.

ment or understanding that the contract was not to be binding until twenty-four signatures were obtained would not be at variance with the terms of the written instrument; and, as a condition precedent to the taking effect of the contract, it might be shown in parol.

II. Exhibit C, as introduced in evidence, showed the names of twenty-four signers. The court permitted certain witnesses for the defendant, over objection by plain-

3. EXPLANATORY
EVIDENCE.

tiff, to testify that at some time while the contract was being circulated for signatures the first name signed to it was crossed off in pencil and subsequently erased. There was evidence tending to show that on December 15th, when Lefebure had a conference with the signers at Carlson's house, the contract did not show twenty-four signers. It seems to be conceded for appellant that when the contract was, on December 22d, delivered to Carlson by Headley it had twenty-four signers; and that the erasure, above referred to, had already been made. Defendants pleaded in their answer that Lefebure and his agent, Headley, secured the signatures of twenty-five persons to the contract, but that many of them were not solvent and responsible; and this allegation was made in connection with another, that there was an oral agree-

ment between Lefebure and defendants that Lefebure should obtain and secure the signatures of twenty-four solvent and responsible persons as parties to purchase the stallion, and that, whenever twenty-four such persons should enter into an agreement for the purchase of the horse, then the notes provided for in the contract should be executed and delivered to Lefebure. It is evident that under these allegations the procuring of the signatures of twenty-five persons to the agreement would not render it invalid, and that the removal of one of the names signed to it, before the execution of the notes, would not affect their validity, provided the twenty-five signatures remaining were those of solvent and responsible parties. The sufficiency of these allegations, with others, to constitute a defense was not questioned at any stage of the proceedings by this appellant or by Lefebure, who was made defendant on cross-petition. The testimony of witnesses as to erasure of a name had no bearing on any issue in the case; but it seems to have been explanatory of other testimony tending to show that at one time there were twenty-five signatures; whereas the instrument as introduced in evidence showed only twenty-four signatures. The testimony introduced also explains, to some extent, the circumstances under which one signature had been erased; the explanation in itself tending to disprove any alteration of the contract after it had become complete and operative under the oral agreement that it should not take effect until twenty-four signatures of solvent and responsible persons were procured. We are fully satisfied that there was no error in the admission of this evidence.

But during the opening argument for the defendants (the court having directed that defendants should open and close) counsel for Lefebure protested against statements of counsel for defendant, making the argument that the erasure of the name on the contract vitiated the entire con-

4. NEW TRIAL:
misconduct:
argument:
review.

tract and made it null and void, contending that such statement was against any claim made by defendants, or any issue in the case. Apparently without any application to the court for any ruling or order, and without any action of the court in the matter, counsel for defendants proceeded in his argument to say that the erasure of the name invalidated the contract and the notes in suit executed in connection therewith. At the conclusion of this portion of counsel's argument, an exception was noted; but no application for any order or ruling was made to the court, and the court took no action. In making such statement, counsel evidently ignored entirely the issue on which the case was being presented to the jury. Counsel for defendants had, after the close of the testimony and apparently before the opening argument, asked leave to amend their answer, so as to plead a material alteration in the contract by the erasure of a signature, and alleging that by reason of such alteration the notes sued on become void and of no effect; but the court had refused to permit such amendment to be made. We are satisfied, therefore, that the argument complained of was improper.

But no question with reference to such improper argument is presented for our determination on this appeal. In law cases, this is a court for the correction of errors committed by the trial court, *Schulte v. Chicago, M. & St. P. R. Co.*, 124 Iowa, 191; and no error of the trial court in this connection is presented to us, or even suggested.

An exception to argument of counsel preserves no question for our consideration. "An exception is an objection taken to a decision of the court or person acting as the court on a matter of law." Code, section 3749. Misconduct of counsel for the prevailing party is a ground for new trial under Code, section 3755, and the misconduct complained of was in this case urged as a ground for new trial, and an exception to the overruling of the motion for a new trial was properly preserved; but no error in the

overruling of such motion is relied on in argument. In the cases cited for appellant in regard to misconduct of counsel, it is not suggested that this court may reverse on that ground, without some erroneous ruling of the trial court being brought to its attention in a proper manner.

III. Many errors are assigned on the action of the court in overruling objections to questions asked of witnesses calling for a conclusion, and in striking out answers of witnesses as conclusions, when portions of the answer in each case were proper. We certainly ought not to be asked to review in detail these various disconnected and incidental rulings, which, as we examine the record, appear not to have been in any way prejudicial to the appellant in the final disposition of the case. Some discretion must be allowed to the trial court in rulings of this character. If the court inadvertently, during the course of the examination of a witness, strikes out an answer which contains some matter not vulnerable to the objection raised by the motion to strike, counsel may easily, and in fairness to the court should, by further question call for such answer as is not objectionable. It is not desirable that a trial should be conducted on the theory of a sparring match between counsel and court as to which may be able to score a point.

Under the assignment that "the court committed sundry errors in the admission and rejection of testimony," with reference to at least forty different pages of the abstract, counsel call attention in argument to a great number of disconnected rulings relating to the admission or exclusion of evidence. Many of these involve to questions that were rendered wholly immaterial in the subsequent progress of the case. We have examined counsel's argument under this heading without being able to discover any erroneous rulings which, under the record, could possibly have prejudiced the appellant. We are unwilling to extend this opinion for the purpose of pointing out

5. EVIDENCE:
examination
of witnesses.

wherein each ruling was either correct or, if erroneous, not prejudicial.

In this connection, also, we may notice the complaint of counsel in another division of their argument that the presiding judge became unusually active in the cross-exam-

ination of witnesses, and in striking out evidence of witnesses without motion of counsel.

6. SAME: examination by the court.

As a practice, it is, of course, unwise for the trial judge to interfere with the examination of witnesses; but, on the other hand, he has a perfect right to do so if he can thereby expedite the trial or assist the witness in giving his testimony and elicit the facts. It does not appear that the rulings of the court complained of in this connection were erroneous; and an examination of the record satisfies us that the trial judge did not do anything calculated to prejudice the jury as against the appellant. We must therefore refrain from an elaborate discussion of the rulings referred to in this connection.

IV. Certain exhibits, consisting of the pleadings in an action brought in South Dakota against other defendants on one of the three notes, signed by these defendants

and others, were admitted in evidence, over objections for the plaintiff, as a part of the cross-examination of Lefebure as a witness.

7. SAME: exclusion of evidence: harmless error.

Thereupon counsel for plaintiff recalled a witness to explain the occasion for the dismissal of that action, and the court refused to allow such explanation to be made. However, erroneous these rulings may have been, they could have had no effect on the result of the case; for during the argument of counsel for defendant, when he attempted to refer to the final disposition of that suit, the court instructed the jury that the matter should not be considered. Counsel for appellant admit that the admission of the exhibits could not have been prejudicial, unless the jury inferred therefrom that in such action the plaintiff was unsuccessful. It must be presumed that the jury observed the injunction

of the court and gave no consideration to the result of that suit. Therefore no prejudice resulted.

V. On cross-examination of defendant Carlson as a witness, plaintiff attempted to show that on December 19th (that is, before the notes were taken from him by Lefebure's

8. NEGOTIABLE INSTRUMENTS: delivery: evidence. agent, Headley) Lefebure in person, had a settlement with Carlson for his services in promoting the negotiations; and they now

contend that if this testimony had been admitted it would have tended to show that Carlson regarded the transaction as completed on that day and recognized Lefebure's right to have the notes. But, so far as the record indicates, the testimony would have been simply that Lefebure on that day paid Carlson for his services. Certainly a voluntary payment of money to Carlson for services and the acceptance of payment by him would not constitute an admission on his part that the terms of the contract between Lefebure and the defendants had been fully performed and complied with. It is not suggested that Lefebure made such acknowledgement on the part of Carlson a condition of the settlement. If Lefebure saw fit to waive any further obligations on Carlson's part and pay him for his services, although the transaction was not fully completed, Carlson's acceptance of the money would not involve any admission on his part as against himself and his codefendants.

VI. The trial court failed to give an instruction asked for plaintiff, to the effect that, under the allegation of an oral agreement between defendants and Lefebure that none

9. SAME: instructions. of the notes should be delivered until the full number of twenty-four solvent and responsible farmers living in the vicinity had signed them, the burden was on defendants to prove the contract as alleged; and, if they should find from the evidence that there was a failure so to do, the issue should be determined for the plaintiff. The contention now made is that, if the jurors believed that the agree-

ment to this effect was in writing, and not oral, they should, under the instruction, have found the issue in favor of the plaintiff, because in that event the defendants would have failed to prove the agreement as alleged. Some of the evidence for the defendants tended to show an oral agreement; while there was other evidence that some written memorandum was given by Lefebure to some of the defendants to the same effect. The court correctly stated the issue to the jury and instructed as to the burden of proof. We can not see how the jury could have been misled in its duty by a failure to give such an instruction as was asked and refused. There was no complaint during the trial of the case in regard to any variance between the allegations and the proof; and we think it would have been error to inject any such question into the instructions after the parties had tried the case on the simple question as to whether the agreement made between Lefebure and defendants on the 15th of December was that the notes should be delivered when twenty-four signatures thereto had been obtained, as contended by defendants, or whether the notes should be delivered when twenty-four signatures as to the contract had been obtained, as contended by the plaintiff.

VII. As applicable to the controversy between defendants and Lefebure as to whether the understanding and agreement on December 15th was that Lefebure should

procure the names of twenty-four signers to the notes, in order to make them valid and binding, the court instructed the jury in accordance with the provisions of Code, section 4617, to the effect that, when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other party understood it. It is now contended that the section referred to announces the rule for the construction of a contract the terms of which are conceded; while the dispute in this case is not over the mean-

10. CONTRACTS:
construction:
evidence.

ing of terms conceded to have been used, but as to what the terms of the agreement in fact were. The statutory provision has, it is true, no application in the construction of plain and unambiguous terms in a contract. *Peterson v. Modern Brotherhood*, 125 Iowa, 562; *Inman Mfg. Co. v. American Cereal Co.*, 133 Iowa, 71; *Capital City Carriage Co. v. Moody*, 135 Iowa, 444. But in the case before us there was conflict in the evidence as to the terms of the oral agreement, and also as to the language used in the written agreement or guaranty, which had been lost. As to each of these matters, it was competent to show the situation of the parties, the subject matter of the controversy, and the interpretation put on the contract by the parties, for the purpose of determining what the agreement really was; and therefore the understanding of the defendants as to the terms and the effect of the contract might be taken into account in determining what the propositions were to which defendants assented. *Thompson v. Locke*, 65 Iowa, 429; *Lull v. Anamosa Nat. Bank*, 110 Iowa, 537; *Field v. Eastern Building & Loan Ass'n*, 117 Iowa, 185; *Stenger v. Rice*, 149 Iowa, 100. The court did not err, therefore in the giving of this instruction. The judgment is,—
Affirmed.

O. J. McMANUS v. CHICAGO GREAT WESTERN RAILWAY Co., Appellant.

Carriers: AUTHORITY OF AGENTS: PRESUMPTION: PROOF OF AUTHORITY:
I EVIDENCE. It will be presumed that a railway agent has no authority to act in the matter of making shipments from stations other than the one at which he is employed, and this is true with respect to his authority concerning shipments beyond the terminus of the road; but such authority may be shown by proof of other like acts of authority, or by the acceptance or approval of like services by his principal. The evidence in this case of the agent's authority to negotiate for shipment from another station is held sufficient to take the question to the jury.

but not sufficient to show authority to make contracts of shipment beyond the line of the company by which he was employed.

Same: DECLARATIONS OF AGENT. The declarations of an agent are
2 not competent on the question of his authority to bind the carrier for shipments beyond its lines, unless his acts in so doing have been ratified or confirmed by carrying the same into effect.

Contracts: VARIANCE BY PAROL. Evidence that the shipping rates
3 were not to be inserted in the contracts of shipment, and that no rates were in fact inserted when the contracts were signed, but that they were made out simply as evidence to the conductor of the right to transportation with the shipment, was not objectionable as tending to vary or contradict the terms of the instruments; but was admissible to show what the contracts in fact were when signed.

Carriers: DELAY IN TRANSPORTATION: EVIDENCE. In this action for
4 delay in transportation the evidence is held to warrant a finding that defendant was responsible for a delay of several hours, between the point of shipment and the yards where the stock was unloaded for feed and rest.

Same. In an action for negligent delay in the shipment of stock,
5 evidence of the length of time required to ship stock between two other points further separated than those in question, and on another line of road, was inadmissible, but in view of the record in this case its admission was not prejudicial.

Evidence of value: ADMISSIBILITY: IRRESPONSIVE ANSWER: OBJEC-
6 **TION.** The inquiry of a witness, if he knew the value of cattle in Canada during a certain month, was objectionable for indefiniteness; but as it was merely preliminary, calling for a fact touching his competency, its admission was not erroneous. And although the answer was not responsive opposing counsel could not raise that objection.

Evidence: OFFER OF EXHIBITS: REVIEW OF RULING. Where portions
7 of a letter were offered in evidence and were excluded upon objection that the entire letter was not offered, and subsequently the introduction of the entire letter by the other party was permitted, the appellate court was not in position to pass on the ruling, in the absence of a showing in the record of the omitted portions when first offered, or to determine whether the party offering only portions was in position to object to the entire offer.

Evidence: MOTION TO STRIKE: REVIEW. A motion to strike certain

8 evidence from the record, which had not been ruled upon by the trial court, will not be reviewed on appeal.

Carriers: NEGLIGENCE DELAY IN TRANSPORTATION: MEASURE OF DAMAGES.

9 Where a carrier contracts to transport stock to the terminus of its line, with the understanding that it is to be taken by other companies and transported in the same cars to its destination, the measure of damages for negligent delay by the initial carrier is the difference in the value of the stock in the condition in which it was in fact delivered, and its value had it been delivered within a reasonable time, at the point of destination.

Carriers: INTERSTATE COMMERCE RATES. Rates for the interstate transportation of freight, which as fixed by the carrier's agent are inconsistent with the schedules filed with the Interstate Commerce Commission, are invalid.

Same: CONNECTING LINES: EXCESSIVE CHARGES: RECOVERY OF SAME.

11 Where the interstate charges on freight were paid by each succeeding carrier to its predecessor up to its own line, and the terminal carrier collected all the freight from the shipper for the entire distance at its termination, and it was not shown that any part of an overcharge ever reached the initial carrier, the initial carrier was not liable for any part thereof.

Appeal from Superior Court of Council Bluffs.—HON. S. B. SNYDER, JUDGE.

MONDAY, JUNE 10, 1912.

ACTION to recover alleged excessive charges, damages to stock shipped, and loss of time resulted in a verdict for the plaintiff, and judgment was entered thereon. The defendant appeals.—*Affirmed on Condition.*

Carr, Carr & Evans, and Saunders & Stuart, for appellant.

Kimball & Peterson, for appellee.

LADD, J.—The facts are quite fully stated in the opinion filed on the former appeal, 138 Iowa, 150. Upon

remand to the district court, amendments to the pleadings were filed, and, though other claims were pleaded, only those for overcharge of freight, injury to stock while in transit over defendant's line, and loss of time by plaintiff's assignors were submitted to the jury. It will be recalled that on the 29th day of April, 1904, three brothers named Baker shipped three car loads of stock and other property from McClelland, Iowa, to High River, Alberta, via the Chicago & Great Western Railway Company, the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, and the Canadian Pacific Railway Company. The property to be transported was loaded in cars of the Canadian Pacific Railway Company and delivered by the defendant at the Minnesota Transfer, near Minneapolis, Minn., and from there hauled by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company to North Portal, N. D., from which point the Canadian Pacific Ry. Co. took them to High River, Alberta.

The Bakers assigned their claims against the defendant to O. J. McManus, who brought this action. McManus, acting for them, had negotiated with one Shipley, as agent

1. CARRIERS:
authority of
agents: pre-
sumption:
proof of
authority:
evidence.

of the defendant at Council Bluffs, Iowa, for the transportation of these cars, though there was a local agent at McClelland, who signed the shipping contracts. The defendant maintained an uptown office at the Grand Hotel in Council Bluffs, bearing Shipley's name, followed by "City Passenger and Freight Agent," and to him McManus applied and was informed the rate would be twenty cents per 100 pounds from McClelland to the Minnesota Transfer, minimum weight of 20,000 pounds per car, and \$45 per car from there to High River, Alberta, on a minimum weight of 24,000 pounds per car, and, after several conversations, Shipley said he would furnish Canadian Pacific cars, and later informed McManus that he had gotten two stock cars and one box car in which the property could

be shipped through to its destination. These cars were sent from Council Bluffs to McClelland, loaded April 29, 1904, and carried the property to its destination. Appellant contends that the evidence was insufficient to support a finding that Shipley was authorized to act for it in negotiating shipments from McClelland or beyond its line of road. Presumably an agent of a railroad company is without authority to act for it in the matter of shipping from stations other than that at which he is employed. *Voorhees v. Railway*, 71 Iowa, 735; *Burgher v. Railway*, 105 Iowa, 336. And this is true with respect to authority concerning shipments beyond the terminus of the road. *McLagan v. Railway*, 116 Iowa, 183; *McManus v. Railway*, 138 Iowa, 150.

But an agent may be shown to possess authority, and evidence tending so to show may be by proof of other like course of dealing or of the acceptance or approval of like services by the principal. "The course of dealing between the parties through the alleged agent is generally relevant and admissible upon the question of agency and its extent. . . . The accepted acts of an agent are always evidence to show the extent of his powers." *Blowers v. Railway*, 74 S. C. 221 (54 S. E. 368); *McCormick v. Lambert*, 120 Iowa, 181; *Grant v. Humerick*, 123 Iowa, 571; Greenleaf on Evidence, par. 64 et seq.

The evidence bearing on Shipley's authority to negotiate shipments from McClelland was such as to leave little doubt as to its existence. At least, it was sufficient to carry that issue to the jury. An examination of the record, however, has not disclosed evidence sufficient to sustain a finding that he also had authority to contract with respect to shipments beyond defendant's lines of railroad. McManus testified concerning a shipment made by a nephew of the Bakers in the fall of 1903, and that:

The Great Western Railway maintained an office in the Grand Hotel on Pearl Street, and one on Main street

in Council Bluffs, in 1903, 1904, and 1905. The Main street office was the depot. The agent was Ed Shipley. I have seen him at those offices and have had conversations with him. The name of the company was on the Grand Hotel office with the name of Shipley, city passenger and freight agent. The Bakers made a shipment from McClelland, Iowa, to High River, in the fall of 1903. Written contracts were made with the Great Western for the shipment from McClelland, Iowa, to Minnesota Transfer, and other contracts with the Soo were made covering the shipment from Minnesota Transfer to North Portal, and at that place other contracts with the Canadian Pacific were made covering the shipment from North Portal to High River. I saw the goods loaded at McClelland and saw them afterwards at High River. I did not have any talk with Mr. Lively, the agent at McClelland, in reference to where they were to go. I had a conversation at Council Bluffs with Mr. Shipley in regard to the shipment of some household goods, stock, and implements, and other emigrant movables of the Bakers from McClelland, Iowa, to High River, Canada, during the fall of 1903. It was at the Grand Hotel city office. I went there to ascertain the rate on a car of emigrant movables from Council Bluffs to High River. At that time I did not know where the car would be loaded. Mr. Shipley, in charge of the office of the Chicago Great Western Railway, quoted the same rate I had received from the agents of other roads I had interviewed. That rate was twenty cents per 100 from Council Bluffs or McClelland to the Minnesota Transfer, a minimum weight car of 20,000 pounds. From the Minnesota Transfer to High River, Alberta, a lump rate of \$45 per car with a minimum weight of 24,000 pounds. I explained to Mr. Shipley that the emigrant movables would consist of farm implements, some household furniture, and stock. In accordance with this conversation, a car was furnished at McClelland, Iowa, for this shipment. Shipley said the Great Western Railway Company would furnish cars for the shipment of goods from McClelland, Iowa, to High River, Canada, in the fall of 1903. He said they would furnish large furniture cars, or they would have the Canadian Pacific cars come down here to be loaded. At that time, I had not decided whether to load at McClelland or

Council Bluffs; but in either case he said he would furnish the cars. He said afterwards it would make no difference whether they furnished furniture cars or Canadian Pacific cars; they could be sent through to High River without unloading. He said they would be so sent. I afterwards told him we had decided to load at McClelland, Iowa, because it was more convenient, and the rate was the same, and it was immaterial to me who furnished the cars, provided they could make a through shipment. He said, in either case, it would be a through shipment, and that the company would furnish the cars. I then went out to McClelland the day he said the cars would be there. It was the next day after our last conversation. Mr. Shipley was at McClelland, and I talked with him there about taking a car that was then loaded with lumber. We unloaded the lumber and used the car the next day for loading. Mr. Shipley went inside the building when he was out there this time at McClelland. . . . At the time I did not know the station agent at McClelland, but I think he was inside with Mr. Shipley at the time he gave these instructions. . . . I saw the goods afterwards which were loaded upon that car at High River. At the time I had this talk with Mr. Shipley and further shipment of these goods from McClelland, Iowa, to High River in the fall of 1903, he said it was necessary to have a bill of lading made out upon which one would ride. He told me they would have new bills of lading on the Soo line and on the Canadian Pacific. He told me the rate for through shipment from McClelland to High River would be twenty cents per 100 to the Minnesota Transfer on a minimum of 20,000 pounds to the car and \$45 per car from there to High River, Alberta, making a total of \$85. Mr. Shipley said the payment would be \$85 per car, providing it did not weigh more than 20,000 pounds. That carload in 1903 went out over the Great Western Railway. I had a conversation with Mr. Shipley in regard to making shipments of three cars in the spring of 1904. I told him I would want three cars for the shipment of goods to the same place where we shipped the car last fall. We would ship from Council Bluffs or McClelland or from Neola, if we shipped by way of the Milwaukee, all of which had given us the same rate. I saw him again, and he said, 'I have given

you two stock cars and one box car for the shipment.' I said, 'I am glad of that.' It would make it more convenient for them to live in a box car and put the stock in the two cars. Q. You may state what, if anything, was said to you about joint through rates in this connection. A. He stated it was a joint through rate. Q. What, if anything, did you say about it differing from the combined rates over the connecting lines? A. He said it was a lower rate than the combined rate or sum of the rates of the defendant carriers. I asked him in reference to the 1904 shipment, if it would make any difference if there would be more than ten head in each car, and he said it wouldn't, provided the weight does not exceed 20,000 pounds. All the cars contained some emigrant movables, but one car contained no stock. . . . I did not see Shipley at the time the 1904 shipment was loaded. We were not able to find the bills of lading of the original shipment in the fall of 1903. Mr. Shipley, with whom I had the talk about the through rate from McClelland to High River, Canada, on the shipment of the goods, was the same Mr. Shipley from whom I obtained the cars. . . . There was no arrangements made with either of the connecting lines for the transportation of these cars, except the arrangements I made with Mr. Shipley for a through shipment. Mr. Shipley said bills of lading would be made out for the person that accompanied the car. He said, about making a through shipment in the spring of 1904, that the shipment would be sent through the same as the previous car in the fall of 1903. I have negotiated for others and made a large number of shipments from McClelland and the vicinity of Council Bluffs to High River, Canada. McClelland is the second station out from Council Bluffs.

Of course, the declarations or statements of Shipley are not to be considered in determining whether he had authority to contract for defendant concerning shipments beyond its lines, save in so far as these were

2. SAME:
 declarations
 of agent. ratified or confirmed by the defendant in carrying them out. Undoubtedly, the car furnished by defendant was hauled to its destination; but this was done precisely as though he had said nothing

concerning a through shipment or rates. The goods with the six head of stock did go through in the same car, but there is nothing in this record to indicate that this was not the ordinary and usual method of transportation, in the absence of any arrangement therefor. Though Shipley may have said reduced rates were being named, the evidence is conclusive that those named by him were the freight tariffs as appear in the schedules filed with the Interstate Commerce Commission of the United States; that of defendant being that named by Shipley, and the joint rate of the other two companies being \$43.50 per car. The excess stated by Shipley of \$1.50 per car may have been switching charges at the Minnesota Transfer, though it is not explained. Moreover, shipping contracts were executed with each of the connecting lines, and, as the shipper accompanied the car, even the duty of forwarding does not appear to have been performed by defendant. As said, transportation of the car in 1903 was effected precisely as though there had been no preliminary arrangement for a through shipment at a specified price, and, this being so, what was done did not tend to ratify or confirm anything Shipley had undertaken beyond defendant's railroad, and therefore was not evidence that he was authorized by defendant to contract concerning transportation over connecting lines. Though we doubt whether he undertook to do more than inform plaintiff of the freight charges over the railroads from the Minnesota Transfer to High River, the manner of transportation over the several lines, and to furnish cars in which the shipper's property might be carried to their destination, it is unnecessary to so decide, as the court should not have submitted the issue as to whether he was authorized to negotiate shipments beyond defendant's road to the jury. See *Hill v. Railway*, 60 Iowa, 196; 6 Cyc. 482.

II. Shipping contracts were signed by the Bakers and also by the agent at McClelland. In these contracts as introduced in evidence, the rate of freight appears to have

been inserted. McManus testified that, under his arrangement with Shipley no rate was to be inserted in the contracts; that these were to be made out merely as evidence to the conductor of the right of the person accompanying the car to transportation. And he and two others testified that the rate had not been inserted when the shipping contracts for carriage over defendant's line were signed. This testimony was objected to on the ground that it tended to vary the terms of a written instrument. The objection was rightly overruled, for the purport of the testimony was not to vary or contradict these contracts, but to prove what they were when signed by the parties.

3. CONTRACTS:
variance
by parol.

III. Cattle were loaded by the Bakers in two of the cars, twenty-nine head in one and twenty-two head in the other, and a part of their other property in each of these, and the rest in the box car which they rode. These left McClelland April 29, 1904, and did not reach the Minnesota Transfer, a distance of three hundred and ninety miles, until May 3d. In the meantime the cattle had not been unloaded. Edwin T. Baker, as witness, was asked:

4. CARRIERS:
delay in
transportation:
evidence.

When you came to Minnesota Transfer, where were the cars left first? A. They were left on the Soo line. Before that they were in the yards. Q. How soon after your arrival at Minnesota Transfer were you put down to the chute? How long a time elapsed before you were put down to the chute? A. Five or six hours. The chutes were out a quarter of a mile from where we pulled in at. We pulled in at the Transfer yards from the general yards. That is what is known as the Minnesota Transfer. The Transfer engine belonged to the yards pulled us down to the chutes. The cars were not all taken down together. Q. Well, did the Great Western Railway Company deliver your cars to a place after you arrived at the Transfer where you could feed and water? A. After five or six hours—after we had been there five or six hours. These yards were built off from the Transfer yards.

We have recited this evidence as the best answer to appellant's contention that it was in no wise responsible for the delay of the five or six hours mentioned. Precisely when the cars were turned over to the Minnesota Transfer Company is not disclosed by the record, and the jury might have found that this did not happen until the cars were hauled to the chute by its engine.

IV. Edward T. Baker was asked the usual time for shipping a car of stock from McClelland to the Minnesota Transfer, and answered, "About forty-eight hours," and

that the distance was 390 miles. He also

5. SAME.

said that it was about 480 or 490 miles from Neola to Chicago, and that he knew how long it took to ship cattle between these points. "Q. You may state how long it takes to ship cattle from Neola to Chicago." Over objection, he answered, "About twenty-four hours." Neola is not on the defendant's line, and just why this evidence was received is not clear. It should have been excluded as having no bearing whatever on the issue.

But damages were claimed only for delay above the usual time in going from McClelland to the Minnesota Transfer, and no other evidence of the usual time required to transport freight between these places was adduced except that of McManus, who fixed the time at from twenty-four to thirty-six hours. As the cars were on the road two days longer than the highest estimate, and the condition of the cattle after starting was not shown save upon their arrival at the Minnesota Transfer, we are of opinion that the error in permitting the witness to state the usual period of hauling freight from Neola to Chicago was without prejudice.

V. E. G. Baker testified at a former trial, but had died since, and the transcript of his testimony was read to the jury. He had been a farmer and shipper of stock for many years, and was asked: "Did you know about what milch cows were worth on the market in Canada, in May,

1904?" This was objected to as "incompetent, irrelevant, and immaterial," and the answer as not responsive. "A. They were pricing milch cows there at \$50 per head." The objection might well have been sustained owing to the indefiniteness of locality; but the question was merely preliminary, calling for knowledge which tended to establish the competency of the witness, and viewed in this light, the ruling ought not to be denounced as erroneous.

6. EVIDENCE OF
VALUE: admis-
sibility: irre-
sponsive
answer:
objection.

The answer was not responsive, but this was not an objection counsel on the other side might urge. Had it been objected to on other grounds, a different question would have been presented. There was no error.

VI. Upon the arrival at his destination, E. J. Baker addressed a letter to McManus, dated June 17, 1904. Defendant offered portions of it in evidence. The plaintiff objected on the ground that the entire letter was not introduced. The objection was sustained. Shortly afterwards, the plaintiff offered the entire letter, and the defendant's objection thereto, as incompetent, irrelevant, and immaterial and having no bearing on the issues, was overruled. As the record does not disclose the portions omitted by the defendant and included by plaintiff, we are unable to pass on the ruling, or to say whether defendant, after tendering most of it, was in a situation to complain of the introduction of the entire letter.

7. EVIDENCE:
offer of exhi-
bits: review
of ruling.

VII. Edwin T. Baker was examined as to the value of the cattle at the Minnesota Transfer; but after stating that they were of the market value of \$1,000, and would have been worth \$1,500 had they been hauled to that place, in the usual time required, on cross and redirect examinations, appeared to have known nothing of the market values at that point. Afterwards, defendant moved to strike out this evidence, but the court remarked, "I will not rule on this at present,"

8. EVIDENCE:
motion to
strike:
review.

and the matter was not referred to again. Of course, the motion should have been sustained; but counsel do not appear to have insisted upon a ruling, and error can not be predicated on a motion in the absence of any ruling thereon. It is to be said, however, that, as the measure of damages as defined in the instructions did not involve the market values at the Minnesota Transfer, the ruling, if made, could not have been of much significance, and this doubtless accounts for counsel not having insisted thereon.

VIII. Edwin T. Baker testified that the value of the cattle at High River, Alberta, if they had been transported, without delay, would have been \$1,500, and that in the condition they were due to the delay and injury from delay which occurred upon the Chicago Great Western Railway they were worth \$1,000, and the court instructed the jury that:

9. CARRIERS:
negligent
delay in
transportation:
measure of
damages.

The proper measure of plaintiff's damage is the difference, if any, in the reasonable market value of the cattle on the market at High River, Canada, at the time they should have reached their destination, in the condition they would have been had they been transported to such destination within a reasonable time; and the reasonable market value of the cattle at High River, Canada, in the condition in which you in fact find they would have been delivered to their destination, taking into consideration only the injury to said cattle, if any, due to unreasonable delay upon the line of the defendant, the Chicago Great Western Railway Company, from McClelland, Iowa, to Minnesota Transfer, Minn., together with interest on such difference, if any you find, from the 18th day of May, 1904.

Appellant urges that, inasmuch as it was to carry the cattle to the Minnesota Transfer, the true measure of damages would be the difference between the market values of the cattle at that place as they were and would have been but for the unreasonable delay on its road. Even though defendant might not have been heard to object if

such measure had been applied, we are not ready to criticize that given. It is undisputed that defendant undertook to haul the cars to the Minnesota Transfer with the understanding that these would be taken by other companies to their destination, and, as the cars were to go through, any detriment to the shippers due to injuries to the property being transported would result at the destination, and it may well be assumed that this was within the contemplation of the parties. The situation is analogous with contracting for shipment with reference to a special market. Defendant arranged to haul the cars in view of their being taken on to a particular locality, and, if because of its delay or other fault the property was injured, the damage to the shipper was at that locality, and the carriage must have been undertaken with this understanding. If so, the measure of damages, as defined in the quoted instruction, was correct, and there was no error.

IX. According to McManus' testimony, Shipley named a freight charge from McClelland to the Minnesota Transfer of twenty cents per 100 pounds or \$40 per car carrying not exceeding 20,000 pounds, and a flat charge from the Minnesota Transfer to their destination of \$45 per car carrying not exceeding 24,000 pounds. With the consent of Shipley, as well as the agent at McClelland, the Bakers loaded twenty-nine head of cattle in one stock car and twenty-two head in another, reserving the box car in which to place most of their furniture and implements, though some were placed in each of the other cars. The rates of transportation as thus fixed were not valid if inconsistent with tariff schedules filed with the Interstate Commerce Commission. *Kansas City Southern Ry. Co. v. C. H. Albers Com. Co.*, 223 U. S. 573 (32 Sup. Ct. 316, 56 L. Ed.—). Defendant introduced in evidence certified copies of tariffs filed by it with the Interstate Commerce Commission from which it appeared that the rate fixed for the trans-

10. CARRIERS:
interstate
commerce
rates.

portation of emigrant movables from McClelland to the Minnesota Transfer was twenty cents per 100 pounds and for cattle 23½ cents per 100 pounds in car load lots. It also introduced in evidence certified copies of the special joint freight tariffs of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and the Canadian Pacific Railway Company from which it appeared that from the Minnesota Transfer to High River, Alberta, the freight on settler's effects was \$43.50 per car of 24,000 pounds. A car load of settler's effects might not contain to exceed ten head of cattle; but if more were included, on these last roads, "the additional animals will be charged for at proportionate rates over and above the car load rate for settler's effects; but the total charge for any such car will not exceed the regular rate for a straight car load of live stock."

There is nothing before us indicating the rates of transportation on stock beyond the Minnesota Transfer. If there was any rule as to freight charges on excess of live

stock in cars shipped as emigrants' movables over defendant's line, this is not disclosed in the record. Was additional freight to be exacted on the stock in excess of ten head

per car or on the cars at live stock rates? If the latter is the rule, but \$14 more might have been charged for hauling the cars to the Minnesota Transfer, and less than this if additional freight were to be exacted on part only. No freight charges were paid in advance. Each succeeding carrier advanced to its predecessor the charges up to reaching its line so that the Canadian Pacific Railway Company collected all transportation charges at High River, Alberta, upon the delivery of the property at that point. The sum of \$255.98 more than \$85 per car was exacted. On what ground this apparent extortion may be justified or explained we are not advised. It is enough now to say that there was no showing of what, if any, part of this reached the

11. SAME: connecting lines: excessive charges: recovery of same.

defendant, and, this being so, there is no ground for recovery of the excess freight charge from it.

If plaintiff cares to file a remittitur of \$255.98 with interest at six percent per annum from May 18, 1904, the judgment as thus modified will be affirmed. Otherwise, reversed.—*Affirmed on Condition.*

J. A. ORCHARD, Appellee, v. EDWARD KIRK and WILLIAM ALLEN, Appellants.

Justice of the peace: APPEAL: JURISDICTION. Where the amount involved in an action in justice court was less than one hundred dollars, the justice therefore having jurisdiction, the Supreme Court on appeal will not acquire jurisdiction, in the absence of a certificate of the judge of the district court; and if the justice was without jurisdiction because more than one hundred dollars was involved then the appellate court would not acquire jurisdiction of the appeal.

Appeal from Greene District Court.—HON. F. M. POWERS, Judge.

MONDAY, JUNE 10, 1912.

ACTION for damages for alleged negligence in leaving certain drainage ditches open and exposed, by reason of which injury resulted to the plaintiff. There was a general denial and a plea of contributory negligence. There was a trial to a jury, and a verdict and judgment for the plaintiff, and defendants appeal.—*Appeal dismissed.*

Wilson & Albert, for appellants.

Geo. G. Bowen and *Brown McCrary*, for appellee.

EVANS, J.—Plaintiff appellee has filed a motion to

dismiss the appeal for want of jurisdiction, and such motion has been submitted with the case. We pass to its first consideration.

The action was begun in justice court by service of original notice wherein the amount claimed was \$99.99. On the return day a petition was filed in the prayer of which plaintiff asked "judgment against the defendants in the sum of \$99.99, with six percent interest and for the cost of the action." Thereupon, on the same day, judgment was entered by default against the defendants for \$99.99 and costs. From this judgment the defendants, appellants herein, appealed to the district court, where the case was regularly tried *de novo* to a jury, resulting in a verdict for the plaintiff. It is the contention of appellee that the case involves less than \$100 as shown by the pleadings. No certificate of appeal was granted by the trial court. The appellant contends that the prayer of the petition in the justice court was sufficient to carry the amount prayed above \$100, and that, therefore, more than \$100 was involved in the case as shown by the pleadings.

The trouble with this position of appellant is that it is just as fatal to him as is the position of the appellee. The jurisdiction of the justice court to render the judgment which it did was necessarily predicated upon the theory that not more than \$100 was prayed. If, therefore, there was jurisdiction in the justice court on that theory, there could be no jurisdiction here. *Griggs v. Norman*, 155 Iowa, 132.

On the other hand, if the amount prayed in justice court should be deemed as in excess of \$100, then the justice had no jurisdiction. If the justice had no jurisdiction, there could be none in the appellate court. For the purpose of this motion, therefore, it matters little upon which horn the appellant is impaled. Appellee's motion to dismiss the appeal for want of jurisdiction must in any event be sustained, and it is so ordered.—*Appeal dismissed*.

S. E. KURTZ, v. PAYNE INVESTMENT Co., Appellant.

Brokers: COMMISSIONS: PROCURING CAUSE. A broker may be instrumental in effecting a sale of real estate and still not be the procuring cause so as to entitle him to a commission for finding a purchaser.

Same: ACCEPTANCE OF PURCHASER. Ordinarily the production of a person willing to make an exchange of properties is not the performance of a contract to find a purchaser; but where the owner has reserved the right to fix the terms of sale, and accepts other property in part payment, he can not object to the broker's commission on the ground that the purchaser did not pay all cash.

Same: COMMISSION CONTRACT: VARIANCE BY PAROL. Where the written terms of an agency made no provision for the payment of commissions in case of an exchange of properties, but had relation only to cases where sales were made, an oral agreement for compensation in case of an exchange was not in conflict with the writing and therefore provable.

Same: MODIFICATION OF CONTRACT BY PAROL. The parties to a written contract may subsequently modify it by an oral agreement, or entirely supersede it by one in parol.

Same: CONTRACT: CONSTRUCTION: WHEN PERFORMED. A broker's contract providing that commissions should be due and payable on settlement of all sales is construed to mean upon full payment of that part of the price to be paid in cash, whether at the time of signing the contract of sale, or only part then and the balance at consummation of the contract; and commissions not thus matured at the time judgment was entered on the contract were subject to a plea in abatement.

Same: PROCURING A PURCHASER: EVIDENCE. The provision in a broker's contract that no commission should be allowed him unless he brought a customer and a sale was closed at that time, did not require the sale to be made at the time the broker was first appointed, but was a limitation of the period in which negotiations then begun should be concluded. Evidence held to require submission of the questions of whether the broker pre-

sented a prospective purchaser and the negotiations then begun resulted in a sale.

Same: RATIFICATION OF AGENT'S ACTS. Confirmation of a sale made 7 by a broker at a price fixed by the owner's agent is a ratification of the agent's representations as to commissions to be paid the broker.

Same: EVIDENCE: *Res gestae*. The statements of an agent of the 8 owner in the sale of land as to the payment of commissions, not a part of the broker's negotiation of the sale, are not admissible as *res gestae* in an action for the commission.

Same: AGENCY: SCOPE OF AUTHORITY. From authority to appoint 9 agents may be inferred authority to fix the terms of the appointment, including the matter of compensation.

Same: EVIDENCE OF COMPROMISE: WAIVER. The admission in evidence of an offer to compromise and settle a suit is reversible error, and is not waived by the cross-examination of the witness.

Same: RECOVERY: QUANTUM MERUIT. Where the claims of a broker 11 to commissions are based upon express contract fixing his commission, instructions authorizing recovery on *quantum meruit* are erroneous.

Appeal from Sac District Court.—HON. Z. A. CHURCH,
JUDGE.

TUESDAY, MAY 7, 1912.

ACTION for commissions alleged to have been earned in finding purchaser of land. From judgment as prayed, the defendant appeals.—*Reversed*.

R. L. McCord, and *Wm. Baird & Sons*, for appellant.

W. A. Helsell, for appellee.

LADD, J.—The defendant is a corporation with its principal place of business in Omaha, Neb. It maintained an office at Odebolt, in this state, from November, 1909, until May, 1910, with F. A. Stroup, its vice president,

in charge, for the purpose of disposing of what were known as the Brookmont farms belonging to A. E. Cook. It employed the plaintiff to bring prospective purchasers for the purpose of enabling it to sell to them tracts constituting said farms. The plaintiff alleged that he so presented Hoefft & Son to whom defendant sold 160 acres, John Wagner to whom it sold 375 acres, and John Coon to whom it sold 395 acres, and that he was to be paid for services so rendered \$2 per acre. In the second count plaintiff alleged that defendant employed him to negotiate an exchange of some of said land with John Huldeen, for which services it agreed to pay him \$2 per acre for the number of acres disposed of in excess of the number received. In the third count claim to a commission of \$2 per acre was made for finding a purchaser for eighty acres received by defendant in an exchange with John Wagner, and that he found a purchaser in the person of Adam Weitzel, to whom the land was sold. In the fourth count reasonable compensation for the services mentioned was demanded.

The defendant admitted having employed plaintiff, and that it agreed to pay \$2 per acre for all lands sold after December 2, 1909, "to parties who were actually brought to the defendant by the plaintiff, . . . where the plaintiff should himself or jointly with the defendant procure said purchaser to sign a contract for the purchase of the land sold by the defendant to such purchaser at the price and on the terms for which said land was listed with the plaintiff for sale at the same time that such purchaser was brought to the defendant by the plaintiff," said commission to be paid "on the settlement of the sales made to 'purchasers.'" The defendant admitted the services rendered in the sale to Hoefft & Son, but averred there to have been 155.97 acres only, admitted services rendered in the sale to Wagner, but averred that this happened prior to December 2, 1909, and that plaintiff was to receive one percent of the purchase price of the acreage above that of

the land received from Wagner, and that this was 148.21 acres at \$135 per acre and 142.7 acres at \$125 per acre. It admitted that he was entitled to the commission claimed on the sale of 165.5 acres to John Coon, but no more, and alleged that settlements had not been made, and nothing would be due until January 1, 1911. It also pleaded that the commission claimed in the second count of the petition would not be due until the date last above stated. In response to count three of the petition, defendant alleged the commission was to be \$1 per acre only, and was not to be payable until settlement fixed for January 1, 1911. It denied liability on a *quantum meruit*, pleaded settlement, and interposed a counterclaim, which was denied in the reply.

I. The farm sold to Hoefft & Son contained 155.97 acres, and plaintiff was entitled to a commission of \$311.94. The farm contracted to John Coon March 17, 1910, contained 235.86 acres, but eighty acres of this previously had been sold to one Hamilton, who was induced to surrender his contract, and allow Coon to buy the land. The defendant was not interested in this change, save as it might aid in disposing of the 155.97 acres. Having been sold to Hamilton, it did not belong to Cook, and there was no showing that plaintiff participated in a sale to Hamilton, save that he was "instrumental" therein. One may be thus instrumental without having anything to do with finding a purchaser. The record was not such as to authorize the allowance of a commission on the sale of this eighty acres.

1. BROKERS:
commissions:
procuring
cause.

II. John G. Wagner entered into a contract for the purchase of 375.62 acres April 7, 1910. That this sale was through plaintiff's agency is not questioned, but it is contended that, owing to previous negotiations, plaintiff was entitled to one percent of the price, instead of \$2 per acre. Wagner had contracted with Cook for the same land November 20, 1909, subject to defendant's approval, and, had such approval been given, the compensation of plaintiff would

have been one percent. But it declined to approve this contract, and the agreement of April 7, 1910, under which he purchased, was upon different terms. On December 2, 1910, the defendant, after consulting with its agents, delivered to plaintiff a letter in words following:

As there is some conflict of opinion as to what the commissions should be to agents on the sale of the 'Brookmont lands' arrangements have been made with you by Mr. Cook on a former deal as to what the commissions should be, and this same arrangement was attempted to be endorsed later when we took up the sale of the land, and as the rate then made and agreed upon is conflicting with the rate made to Eastern agents, and is not appearing to be satisfactory with local agents, we have determined to cancel the arrangement formerly made and make a flat rate of \$2.00 per acre as commission to agents on the sale of the 'Brookmont Lands.' The commissions will be due and payable on the settlement of all sales; for instance—after a purchaser signs a proposition and puts up earnest money with the contract to settle the balance cash required on the first payment March 1, 1910, then the commissions will be due and payable on that settlement, but where a purchaser settles at once and pays the cash required that otherwise would be due March 1, 1910; and the contract is made jointly between Mr. Cook and the purchaser and signed up, in that event your commissions are due on that settlement. Now I hope this is entirely satisfactory to you and you have said it would be, and that you would push the work to the uttermost. I have adjusted this commission on a basis that I thought was right, and with the idea in view that it would promote business and encourage you to get out after the business, and I believe it will, and I hope you will not disappoint me. The above arrangement applies to business from now on; that is, on all propositions that are closed from this date. No commissions will be allowed to an agent unless he brings the customer and closing is had at that time.

The deal with Wagner was not closed until long thereafter, and by the express provisions of this letter it applies thereto, and plaintiff is entitled to commission on the basis

therein specified. But Wagner exchanged eighty acres of land, and it is insisted that plaintiff ought not to be allowed commission on more than the difference, or 295.62 acres. He is entitled to that much and whether to anything on the eighty acres received was a matter to be submitted to the jury.

Of course, a sale is not to be confused with an exchange, and ordinarily one who undertakes to find a purchaser has not done so if he produce a person ready to trade. If, how-

2. SAME: acceptance of purchaser.

ever, such a person is produced and a principal who has reserved the right to fix the terms of sale sells his property and accepts

in part payment something other than money, he is not in a situation to object to the agent's claim for commission of an agreed price per acre on the ground that he did not present a customer paying all cash.

If, then, there was no agreement other than that contained in the letter quoted, plaintiff would be entitled to \$2 per acre on the entire tract. But defendant contended

3. SAME: commission contract: variance by parol.

that it was understood orally that the agent's commission should be computed on the difference in acreage between that contracted

and received in exchange. Such an arrangement was not in conflict with the terms of the letter, for the latter related to sales and this to exchanges.

Moreover, subsequent to the writing of the letter, it was competent for the parties to modify the terms specified in the letter by oral agreement or even to supersede such

4. SAME: modification of contract by parol.

written contract by an oral one. Evidence of admissions by plaintiff tending to sustain the claim that there was an understanding with

respect to exchanges is to be found in the record, but, when defendant's manager Stroup was on the witness stand, he was asked: "Did you at the time or subsequent to the writing of this letter of December 2d have a conversation with Mr. Kurtz as to what commission he would be allowed

on the sale of the Brookmont lands when other lands were taken as part payment?" An objection as "immaterial, irrelevant, seeking to dispute the terms of a written contract" was sustained. The ruling as appears from what has been said was erroneous. Such additional agreement was sufficiently pleaded, and whether entered into prior to the final contract with Wagner should have been submitted to the jury. If it had been, then plaintiff was entitled to \$2 per acre on 295.62 acres only; otherwise on the entire tract.

III. The defendant pleaded that the above commissions would not be due until January 1, 1911, as settlement, as contemplated in the letter of December 2d would not be effected with the several purchasers until then. It will be observed therefrom that if a part of the cash payment only made at the time the contract of purchase was signed, and the remainder to be paid when the deal was closed, the commission was not to be paid until the latter date; but, if the entire cash payment were made at the signing of said contract, the commission would be payable then.

The term "earnest money" is used as synonymous with "first payment," not in a technical sense, and the letter clearly explains that by "settlement of all sales" was meant the full payment of the portion of the purchase price to be paid in money, whether this were at the time of signing the contract subsequently to be executed or in part at that time and the remainder when it should be consummated. Reverting to the several transactions, we find that Hoefft & Son paid \$1,005.95 down, and were to pay \$5,000 January 1, 1911, and then execute mortgages securing the same. Wagner paid \$4,000 when the contract was signed, and was to pay \$650.50 and execute mortgage security January 1, 1911. Plainly enough, the commissions for finding these purchasers had not matured when judgment was entered,

5. SAME:
contract:
construction:
when per-
formed.

and the plea in abatement as to such commission should have been sustained.

IV. On the 20th day of April, 1910 John Coon made a second purchase—this time of 160 acres. But \$500 was paid down, and \$5,550 was to be paid January 1, 1911, and a mortgage executed to secure deferred payments, so that, even if a commission were owing plaintiff, it did not become due until the date last mentioned. Was he entitled thereto at any time? By the terms of the employment, no compensation was to be “allowed to an agent unless he brings the customer and closing is had at that time.” This can not be construed as meaning the particular meeting at which he is presented, but was evidently intended to limit the period during which negotiations then begun continued. Coon and defendant’s agents testified that no reference to the last tract purchased was made pending negotiations for the sale of the 240 acres first mentioned, and that these ended March 17, 1910, while plaintiff swore that Coon accompanied him and another agent in an automobile hired by plaintiff for the purpose of showing Coon’s brother’s land, and, upon the latter saying he did not like it, Coon said, “Well if he don’t want it, I will give them a deal for it on my irrigation land,” that, upon their return to Odebolt, defendant’s manager arranged with Coon to wire, and told plaintiff he had done so to ascertain the value of the Idaho land, and that in about two weeks the deal was closed.

The issue as to whether Coon was presented by plaintiff to defendant as a prospective purchaser of the tract last bought by him, whether negotiations for the purchase were then begun, and the sale effected in pursuance of negotiations so begun, were issues which should have been defined in the instructions to the jury.

V. The defendant agreed to pay plaintiff \$2 per acre for the difference in acreage between lands contracted to and received from Huldeen, and this amounted to \$236. The

6. SAME: procuring a purchaser: evidence.

defendant contended that this commission was not to be paid until January 1, 1911, and whether such was the understanding was for the jury to decide. Of course, the matter of maturity of plaintiff's claims will be of no farther importance, save possibly in the amendment of pleadings and taxation of costs.

VI. The plaintiff, with the aid of one Schmitz, negotiated the sale of the eighty acres received of Wagner to Weitzel. Defendant admitted it was to pay a commission of \$1 per acre, but plaintiff denied there was such an agreement. Schmitz was asked: "Didn't Stewart tell you directly what you were to have?" Over objection as immaterial and incompetent, the witness answered: "Mr. Stewart said the commission would be \$2 per acre." Counsel argue that the ruling was erroneous, in that the statement was not within the scope of Stewart's agency. The statement is claimed to have been made when they were in Weitzel's yard and shortly before the bargain.

Stewart fixed the price for which the land might be sold and sale at such price was subsequently confirmed by defendant. This undoubtedly ratified whatever representations Stewart made to Weitzel (*Eadie v. Ashbaugh*, 44 Iowa, 519; *Campbell v. Park*, 128 Iowa, 181) but affords no ground for inferring an approval of Stewart's statement to Schmitz, not necessarily involved in selling.

It is argued that Stewart's statement as it was made in contracting for the principal should be received in evidence as part of *res gestae*. *Haven v. Brown*, 7 Greenl. (Me.)

421 (22 Am. Dec. 208); *School v. School*, 122 Pac. 494 (15 Atl. 881, 9 Am. St. Rep. 124); *Farrar v. Peterson*, 52 Iowa, 420; *Eadie v. Ashbaugh*, 44 Iowa, 519. But it does not appear to have been any part of the negotiations with the purchaser, and therefore is not to be so regarded. Stewart testified that his duties were "generally to appoint agents and work

7. SAME:
ratification
of agent's
acts.

8. SAME:
evidence:
res gestae.

together with them in teresting buyers." The defendant confirmed what he did in the way of fixing prices, and from this and the circumstance that he had authority to appoint agents and work with them it might have been inferred that he also was authorized to arrange with the agent the terms on which services should be rendered.

In other words, from the authority to appoint agents, there may be implied the authority to define the terms of such appointment, including the matter of compensation.

9. SAME: agency: scope of authority. As there was evidence that Stewart was without such authority, the issue was appropriate for the determination of a jury. If he was without authority, and there was no agreement that his commission should be \$1 per acre, then plaintiff was entitled to recover on a *quantum meruit*, and this is the only item in the record for which compensation on this basis was permissible.

VII. This question was asked plaintiff: "As a matter of fact, when you were quarreling about the amount that was due, he (Stroup) finally offered you \$1,200, is that right?" Over an objection as incompetent, irrelevant, and immaterial, he answered: "He offered me \$1,200. This was his third offer. That was final, and is the most money he offered me. When I demanded settlement before suit, he only offered me \$250. I demanded payment before we started suit." The ruling was erroneous and prejudicial, and cross-examining the witness did not waive the error. The law favors the adjustment of disputes outside of court, and will not permit either party to make use of mere offers of compromise in evidence as in the nature of admissions against the other. *Rudd v. Dewey*, 121 Iowa, 454.

Nor was the error in ruling otherwise waived by cross-examination on the subject. The evidence having been erroneously admitted, it was permissible to destroy its per-

nicious effect, if possible, by bringing out all the facts relating thereto.

VIII. Instructions 11 and 12 permitted the jury to discard the claim of plaintiff to the compensation agreed upon and recover on a *quantum meruit*. This was error, for there was no dispute but that all the services rendered by plaintiff were in pursuance of an express agreement fixing his compensation save possibly in negotiating the sale to Weitzel Tuffree v. Binford, 130 Iowa, 532.—*Reversed*.

II. SAME:
recovery:
quantum
meruit.

LEHIGH SEWER PIPE & TILE Co., LEHIGH PRODUCTS Co., CAMPBELL BRICK & TILE PLANT, Appellants, v. THE Incorporated Town of LEHIGH, J. A. WILLIAMS, Mayor of said town; F. F. NELSON, GEORGE EDINGTON, B. J. LANG, W. J. POST and J. F. SUER, Members of the town council of said town; R. A. DUBOIS, Clerk of said town; and F. F. NELSON, B. J. LONG and J. A. WILLIAMS, members of the election board and judges of the election held on July 6, 1910, and J. W. POST and R. A. DUBOIS, Clerks of said election, Appellees.

Municipal corporations: EXTENSION OF LIMITS: REVIEW OF PROCEED-
I I NGS: *Certiorari*. In the absence of fraud the action of a town council or of the electors in extending the limits of the incorporation can not be reviewed by *certiorari*, on the ground that there was no necessity for the extension; hence evidence that the purpose of the extension was to derive revenue from the town, to sell bonds and to increase the indebtedness, was not admissible: Nor in such a proceeding can there be a recount of the ballots cast on the question of extension.

Same: *Certiorari*: ABSTRACT: RETURN: AMENDMENT. It is permis-
2 sible in *certiorari* proceedings to review the action of a town council in extending the limits of the town for defendant to amend the abstract curing an alleged defective description of the territory, and to amend its return by striking out that part

Sept. 1912] LEHIGH P. & T. Co. v. TOWN OF LEHIGH. 387.

showing that the polls were not opened until after the proper hour.

Same: REVIEW OF MINISTERIAL ACTS. *Certiorari* will not lie to re-
3 view a ministerial act; such as the receiving or rejection of
votes by the judges at a municipal election on the question of
extending the town limits.

Same: MUNICIPAL ELECTIONS: RECORDS. The record of a town coun-
4 cil is not conclusive on the question of when the polls of a
municipal election were opened; as the same is not the record
of the judges and clerks of the election.

Same: DEFECTIVE BALLOT: REVIEW: *Certiorari*. *Certiorari* will lie
5 to review the action of an inferior tribunal only when it has
acted in a judicial or semi-judicial character, and then only
when the act was without jurisdiction or otherwise illegal; it
is not the proper remedy for the correction of mere errors,
nor of ministerial, administrative or legislative acts; nor to con-
trol the discretion of a judicial or semi-judicial body: Thus
where the proper officials, in preparing the ballot used at an
election on the question of extending the limits of an incor-
porated town, a purely ministerial act, omitted therefrom a de-
scription of the territory to be added, which constituted the
only error complained of, and it in no manner prejudiced any
elector, *certiorari* was not available for the purpose of vitiating
the whole proceeding; but there was an adequate remedy either
by injunction or *quo warranto*.

Appeal from Webster District Court.—HON. C. E. ALBOOK,
JUDGE.

MONDAY, JUNE 10, 1912.

THIS was a *certiorari* proceeding to review the action
of the town council of the incorporated town of Lehigh in
extending the limits of said town. The trial court dis-
missed the petition and plaintiffs appeal.—*Affirmed*.

Mitchell & Fitzpatrick, and *Healy & Healy*, for appel-
lants.

Frank Maher and *Kelleher & O'Connor*, for appellees.

DEEMER, J.—The incorporated town of Lehigh is in the southern part of Webster county, and prior to the proceedings complained of contained 240 acres. By the extension which is challenged it was made to include 1,440 acres; plaintiffs' property being in the territory added to the town. The proceedings began with the passage of a resolution by the town council on June 6, 1910, which provided that the matter of extension be submitted to the electors at an election to be held on July 6th of the same year, and directed that notice of such election be given as provided by section 615 of the Code. The resolution directed that the question to be submitted should be: "Shall the incorporated limits of the town of Lehigh, Iowa, be extended in the following manner, to wit: Commencing at the north quarter corner of section 7, township 87, range 27, west of the 5th P. M., thence west on the section line to the northwest corner of section 12, township 87, range 28, thence south on the section line to the west quarter corner of section 13, township 87, range 28, thence east on the quarter line to the center of section 18, township 87, range 27, thence north on the quarter line to the starting point so as to include within the area of the incorporated limits of said town all of the said lands located within the limits above described?" Said resolution was put to a vote of said council, which said vote thereon was as follows: "F. F. Nelson, Yes. George Eddington, Yes. B. J. Lang, Yes. J. F. Suer, Yes. W. J. Post, Yes. And said motion and resolution was duly declared adopted."

The notice which was published in the Lehigh Valley Argus, the last of the publications being June 30, 1910, was as follows:

To the electors of the town of Lehigh and to all persons whom it may concern. Notice is hereby given that whereas the town council of the town of Lehigh, Webster county, Iowa, on the 6th day of June A. D. 1910, passed a resolution extending the corporate limits of the

town of Lehigh, in the following manner, to wit: Commencing at the north quarter corner of section 7, township 87, range 27, thence west on the section line to the northwest corner of section 12, township 87, range 28, thence south on the section line to the west quarter corner of section 13, township 87, range 27, thence east on the quarter line to the center of section 18, township 87, range 27, thence north on the quarter line to the starting point and so as to include within the incorporated limits of the said town of Lehigh all of the lands within the above described limits. And, whereas, the said town council of the town of Lehigh, Iowa, fixed the 6th day of July, A. D. 1910, as the time for holding an election on the question for the purpose of voting upon the extension of the incorporated limits as above set forth all such electors and all persons whom it may concern are therefore hereby notified that an election is hereby called in accordance with the law, including the provision of Code section 615 of the Code of 1907, to be held on the 6th day of July, A. D. 1910, in the said town of Lehigh, Iowa, in the Salvation Army building located on Main street of said town of Lehigh, Iowa, and that the question to be voted on at said time will be: 'Shall the incorporated limits of the town of Lehigh, Iowa, be extended in the following manner, to wit: Commencing at the north quarter corner of section 7, township 87, range 27, west of the 5th P. M., thence west on the section line to the northwest corner of section 12, township 87, range 28, thence south on the section line to the west quarter corner of section 13, township 87, range 28, thence east on the quarter line to the center of section 18, township 87, range 27, thence north on the quarter line to the starting point and so as to include within the area of the incorporated limits of said town all of the land located within the lines above described?' You are hereby notified to be present and vote on said question and to govern yourselves accordingly. (Signed) J. W. Williams, Mayor of the Town of Lehigh, Iowa.

Affidavit of publication was duly made showing four consecutive publications. The town council appointed two of their own number and the mayor to act as judges of

election and two others as clerks, and the record of the town council shows the following with reference to the election:

At a special election held in Lehigh, township of Sumner, county of Webster, state of Iowa, on the 6th day of July, 1910, the polls of said special election were opened at 9:00 o'clock a. m. of said day. That 247 votes were cast at said election, 115 for, 110 against, and 22 defective, and the election was declared carried by a majority of the votes. The judges of the election then proceeded to declare the extension a part of the town of Lehigh.

Some questions are made regarding this return which will be hereafter referred to. The ballots used at the election were in the following form:

"Shall the incorporate limits of Lehigh, Iowa, be extended to include the territory described in the proclamation of the mayor of Lehigh? To vote yes make an X in the square opposite the word 'Yes.' To vote No make an X in the square opposite the word 'No.'

Yes ☐
No ☐ "

It is claimed that of the twenty-two ballots rejected as defective, fourteen were against the extension and eight for; that one man appeared to vote between 8 and 9 o'clock in the morning but could not do so; and that one vote was cast by a man who lived outside the territory. Plaintiff also attempted to show that there was no occasion for extending the limits of the town, and that it was done to take in plaintiffs' large factory for revenue purposes only. Refusal to receive such testimony is made one of the grounds of complaint. It is also contended that the resolution was insufficient, the ballots defective, the selection of judges illegal, the polls were not open at the time required, illegal votes were cast and counted, and legal votes rejected, and that the trial court was in error in permitting defendants to amend their return to the writ, such return being in con-

tradiction of the records made by the town council as to the time of opening the polls.

The proceedings being by certiorari, we may at once eliminate some of the questions argued. There being no fraud charged, it was not permissible in this form of action

to review the action of the town council or the electors on the ground that there was no necessity for the extension; hence the trial court did not err in rejecting the testimony offered to show that the purpose of the extension as gathered from the conduct of the defendants was to derive a revenue from the town, to sell bonds, and to increase its indebtedness. *Spitzer v. Runyon*, 113 Iowa, 619; *State v. Village*, 112 Minn. 330 (127 N. W. 1118).

Again, upon such a proceedings as this, there can be no recount of the ballots. *State v. Sundquist*, 137 Wis. 292 (118 N. W. 836); *State v. Village*, 95 Minn. 243 (103 N. W. 1017); *People v. Austin*, 20 App. Div. 1 (46 N. Y. Supp. 526).

The alleged defective description of the territory to be included has been cured by an amended abstract, and it was permissible for the defendants to amend their return by striking therefrom that part showing the polls were not opened until 9 o'clock. As the record now stands, there is no affirmative showing that the polls were not open at 8 o'clock in the morning as the law requires; indeed, the preponderance of the testimony shows that the judges and clerks were present from 8 in the morning until it closed at the regular hour, and that every one who presented himself to vote or who expressed a desire to do so was given opportunity.

It is doubtful if any one outside the proposed territory was permitted to vote. But, however, this may be, there is no showing as to how he voted, and it is manifest that his

1. MUNICIPAL
CORPORATIONS:
extension of
limits: review
of proceed-
ings: certi-
orari.

2. SAME:
certiorari:
abstract:
return:
amendment.

vote alone would not have changed the result. Finally, the matter of receiving or rejecting votes was purely ministerial, and, of course, certiorari will not lie to review purely ministerial functions. *Lane v. Mitchell*, 153 Iowa, 139. The judges and clerks of election were properly chosen under section 615 and 1093 of the Code of 1897.

3. SAME:
review of
ministerial
acts.

The trial court did not err in holding that the record made by the town council as to when the polls were opened, was in conclusion upon the question for the reason that the record of the town council was not the record of the judges and clerks of election, and hence not binding.

4. SAME:
municipal
elections:
records.

As already stated, alleged errors in the description of the territory proposed to be added have been corrected, and the only question left for consideration, if there be any

5. SAME: defec-
tive ballot:
review:
certiorari.

with which we may deal in this proceeding, is the insufficiency of the ballot which did not describe the territory to be added except in this way: "The territory described in the proclamation of the mayor of Lehigh." It is conceded that there was but one proclamation, which was duly published as required by law, and that this gave a correct description of the property to be added. But it is argued that, as the statute expressly provides that a description of the territory to be added must be printed upon the ballot, the entire election was invalid because the ballot did not contain this description except by reference, and that the entire proceedings should be annulled. The issue thus presented is a very narrow one, and involves three considerations: (1) Does the statute require that the description be printed upon the ballot itself? (2) Is the statute mandatory? (3) If the ballots were defective, may an interested party have the entire election and all the proceedings annulled by *certiorari*?

By section 615 of the Code Supplement, the boundaries

of a town may be extended upon a vote of the electors after a resolution providing therefor shall have been passed by the town council, which resolution must fix and describe the boundary to the proposed extension. This section also provides for a proclamation by the mayor, "setting forth the exact question to be presented to the electors for determination." Section 642, 1088, and 1171 relate to the conduct of town and city elections, both general and special, and section 1106 of the Code Supplement, among other things, says that:

When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot preceded by the words 'shall the following amendment to the Constitution (or public measure) be adopted?' and upon the right hand margin, opposite these words, two spaces shall be left, one for votes favoring such amendment or public measure, and the other for votes opposing the same. In one of these spaces the word 'yes' or other word required by law shall be printed; in the other, the word 'no' or other word required, and to the right of each space a square shall be printed to receive the voting cross, all of which shall be substantially in the following form:

'Shall the following amendment to the Constitution (or public measure) be adopted?'

(Here insert in full the proposed constitutional amendment or public measure.)

Yes ☐

No ☐

The elector shall designate his vote by a cross mark, thus 'X,' placed in the proper square. . . . Such ballots shall be indorsed and given to each voter by the judges of election, as provided in section eleven hundred and sixteen (1116) and shall be subject to all other laws governing ballots for candidates, so far as the same shall be applicable.

Section 1121 of the Code Supplement contains this provision: "None but ballots provided in accordance with the provisions of this chapter shall be counted."

There are other provisions of law with reference to

referendum votes in townships, school districts, cities, and towns, but none of these seem applicable here, although we may draw some analogies from decisions thereunder. The statutes, so far considered, are mandatory in terms, and seem to provide that the proposition shall be printed upon the ballot, and not left to mere reference. The decisions from other states generally hold such provisions mandatory. *Griffin v. Tucker*, 51 Tex. Civ. 522 (119 S. W. 338); *Sweeney v. Bigelow*, 202 Mass. 539 (88 N. E. 917); *McLaughlin v. Summit Hill*, 224 Pa. 425 (73 Atl. 975). But in construing a somewhat similar statute we said:

Section 2749 (Code 1897) of said chapter enumerates the general powers of the voters assembled at the annual meeting of the school district, and among other powers given by said section is the power to submit to the voters any proposition authorized by law, and to provide in the notice for the annual meeting for submitting such proposition. It is also provided therein that all propositions shall be voted upon by ballot, and that such ballot shall state the proposition. The only substantial difference between the notice of the submission of the proposition and the ballot which was voted at the annual meeting is to be found in the omission from the ballot of the limit of \$4,000 contained in the notices, and it is upon this difference that the appellants base their contention that the ballot was insufficient. It is undoubtedly the rule that the acts of the board must in all essential particulars comply with the statute; but it does not necessarily follow that the ballot must contain a recital of every preliminary step theretofore taken, or that it must alone furnish complete information as to the amount which it was proposed to raise for the building of the schoolhouse. It will be noticed that the proper resolution had been passed by the board submitting the question to the vote of the electors of the district, and that the proposition to be voted upon was, in fact, included in the notice of the meeting. Every step necessary to submit the proposition to the voters in a legal way had been taken preceding the ballot, and the ballot itself must of necessity relate to such prior action, and must be considered therewith. Section 2749 provides no specific form of ballot,

but only requires that it shall fairly and intellectually present the question that is to be voted upon. It is a general rule that in submitting a question of issuing bonds a substantial compliance with the statute is sufficient. 11 Cyc. 557. If the voter knows or can readily ascertain the full scope and meaning of the proposition by reference to other papers and proceedings, it is sufficient. In other words, the language of the ballot is to be construed in the light of facts connected with the election. *Rock v. Rinehart*, 88 Iowa, 37.

In *Hawes v. Miller*, 56 Iowa, 395, the form of the ballot used in a county seat election was in question, and it was there said: 'If the ballot expressed such intentions beyond a reasonable doubt, it is sufficient without regard to technical inaccuracies or the form adopted by the voter to express his intentions. Of course, the language of the ballot to be construed in the light of all facts connected with the election, and the subject contemplated in the proposition submitted to the electors, and the like, may be considered to aid in disclosing the intention of the voter.' In this case, as we have seen, the preliminary resolution placed the limit of the bonds at \$4,000, and the notice placed the same limit upon the amount of the bonds to be voted upon; and, while the ballot failed to place the same limit on the amount of the bonds issued, it refers to the notice and resolution, and it is clear that the voters fully understood that such issue would not exceed \$4,000. We think the trial court properly held the ballot in substantial compliance with the requirement of the statute. (*Calahan v. Handsaker*, 133 Iowa, 622).

In this connection it should be remembered that for the defects complained of the electors were in no manner responsible. These were due to the officers in charge of the election, and the general rule as to such matters has thus been stated: "As to the form of ballot used, the statute says that the voter shall designate his vote by writing the word 'Yes' or 'No' in an appropriate place on the ballot. The form prepared for the electors did not strictly follow the law, in that the words 'Yes' and 'No' were printed upon the ballots, and the voter was to indicate his choice. These ballots were prepared by the officials of the school

township, and not the electors, and, so long as none of the voters were misled thereby, technical defects in the form of the ballots should be disregarded. This part of the statute should be regarded as directory only. Notices were posted at the place of meeting, directing the manner of voting by marking crosses in the squares, and, as this follows the custom now and for a long time prevailing at general elections in this state, no one could have been deceived by the form of ballot used. Where mistakes of officials, and not of electors, are relied upon, prejudice must be shown in order to defeat an election fairly held. *State v. Bernholtz*, 106 Iowa, 157; *Cook v. Fisher*, 100 Iowa, 31. There is another case bearing upon this proposition which neither counsel nor we have been able to find; but it holds that there was no such defect in the ballot used as to defeat the election. The departure from the statute in that case was much greater than in this one." *Kinney v. Howard*, 133 Iowa, 94. We also quote the following from *Cook v. Fisher*, 100 Iowa, 37, as applicable here: "Unless the law is clearly mandatory, or in some way declares the consequences of a departure from its provisions, the court ought not to defeat the will of the people, when fairly expressed, because of some technical error or mistake in the form of the ballot; and in this case there is no claim or suggestion of fraud on the part of any one, or that the returns now in the possession of the secretary of state do not correctly represent the will of the people as expressed at the polls." There is an affirmative declaration in our statute that none but official ballots shall be used or counted, and that it is mandatory. There is, however, no affirmative declaration that official ballots, corrected as these were, shall therefore cease to be official ballots, nor that such ballots, when legally cast, shall not be counted. See, also, the cases cited in each of these opinions. No prejudice will be presumed in such cases as this and there is absolutely no testimony that any one of the electors was deceived by the

failure to describe upon the ballot the exact territory, which it was proposed to include.

But a more serious question than any so far considered is this: Conceding arguendo that the statutes are mandatory and the ballots defective, is *certiorari* the proper remedy whereby to challenge the proceedings? This extraordinary remedy will lie "when authorized by law and in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction or is otherwise acting illegally and there is no other plain, speedy and adequate remedy." Code, section 4154.

Such remedy will not lie unless the action complained of it either judicial or semi-judicial in character, and then only when the board or tribunal is without jurisdiction or is otherwise acting illegally. It does not lie to correct mere errors, nor is it available if the acts complained of are ministerial, administrative, or legislative in character. Nor can it be used to control the discretion of a judicial or semi-judicial tribunal. It is true, of course, that the town council acted in a *quasi* judicial capacity in determining whether or not it would submit the matter of extension to the electors, and it is also true, no doubt, that, unless it passed the necessary preliminary ordinance or resolution and gave the notice required, it was without jurisdiction to proceed at all. *Moore v. Perry*, 119 Iowa, 423. But there being no defects in either the resolution or the notice, and no valid complaint of anything except the ballot, it would seem that *certiorari* will not lie to annul the entire proceeding because in the mere ministerial act of preparing the ballot a mistake occurred, particularly where, as in this case, the mistake was wholly without prejudice. These views find support in *People v. Austin*, 20 App. Div. 1 (46 N. Y. Supp. 526); *State v. McIntosh*, 95 Minn. 243 (103 N. W. 1017); *Tiedt v. Carstensen*, 61 Iowa, 334; *Polk Co. v. Dist. Court*, 133 Iowa, 710; *Brockway v. Board*, 133 Iowa, 293. Assuming that the ballots were

void, and for that reason the election illegal, plaintiff had a plain, speedy, and adequate remedy by injunction. *Ind. Dist. v. Taylor*, 100 Iowa, 617; *Jordon v. Hayne*, 36 Iowa, 9; *Darling v. Boesch*, 67 Iowa, 702; *Molyneaux v. Molyneaux*, 130 Iowa, 100. Doubtless an action of *quo warranto* might also be brought under the rules announced in *State v. Ry. Co.*, 135 Iowa, 694; *State v. Alexander*, 129 Iowa, 539; *State v. Ind. Dist.*, 29 Iowa, 264. A recent text-writer has said that the only remedies whereby to test the validity of annexation proceedings are injunction or an action of *quo warranto*. 1 McQuillin on Municipal Corporations, section 288, citing among other cases: *People v. York*, 247 Ill. 591 (93 N. E. 400); *McCain v. City*, 128 Iowa, 331; *East Dallas v. State*, 73 Tex. 371 (11 S. W. 1030); *People v. Ontario*, 148 Cal. 625 (84 Pac. 205); *State v. Des Moines*, 96 Iowa, 521; *Delphi v. Startzman*, 104 Ind. 343 (3 N. E. 937).

Our conclusions on the whole case are in harmony with those of the trial court, and its judgment must be, and it is—*Affirmed*.

In re Appeal of C. P. LIGHTNER from the action of the Board of Supervisors in apportioning amount of special assessment of taxes against his land by reason of the establishment of drainage district No. 7 in GREENE COUNTY, IOWA, C. P. LIGHTNER, Appellee, v. Board of Supervisors of GREENE COUNTY, IOWA, et al., Appellants.

Drainage: NOTICE OF APPEAL: SERVICE OF NOTICE. A notice of appeal from the district court in drainage proceedings is not fatally defective because reciting in the caption the following "In the Supreme Court of Iowa," but the same will be treated as surplusage, where enough remains to indicate the judgment appealed from: Nor need the notice be addressed to the clerk by name. And accepted service of the notice by the clerk and the filing thereof by him was a sufficient service.

Appeal: WAIVER OF RIGHT. Acceptance of the amount of a drainage
2 assessment by the treasurer, after an appeal was taken, was not
a waiver of the right of appeal, where the acceptance expressly
reserved that right.

Same: ASSESSMENT OF BENEFITS: OBJECTIONS: SUFFICIENCY. On ap-
3 peal in drainage proceedings the appellant is confined to such
objections as were made before the board of supervisors; and
they must have been sufficiently specific to fairly suggest the
real issue sought to be raised. The objections to an assess-
ment in this case were sufficient to raise the questions of whether
the apportionment of the expense was equitable, and whether
it exceeded the benefits conferred.

Same: APPEAL: BURDEN OF PROOF. On appeal from a drainage assess-
4 ment of the board of supervisors the district court will assume
that the assessment as made by the board was correct, and the
party appealing has the burden the overcoming the presumption;
and on appeal to the Supreme Court it will be assumed that the
district court observed this rule, thus casting the burden on the
appellant to show its incorrectness.

Same: ASSESSMENTS: VALIDITY. The assessment of the entire cost
5 of a tile drain running practically the entire length of a forty
acre tract within a drainage district, to that particular forty acres,
was erroneous.

Appeal from Greene District Court.—HON. F. M. POWERS,
JUDGE.

MONDAY, JUNE 10, 1912.

APPEAL from an order of the district court reducing
assessments for benefits against certain tracts of land
owned by plaintiff within a drainage district established by
the board of supervisors of Greene county, Iowa. From
the assessment made by the board against eight forty-acre
tracts of land owned by plaintiff, he appealed to the district
court, and upon the appeal the district court reduced the
assessment against five of the forties and confirmed it as
to the other three. The board of supervisors appeals.—
Modified and affirmed.

Wilson & Albert, for appellants.

Howard & Howard, for appellee.

DEEMER, J.—The board of supervisors of Greene county established what was known as drainage district No. 7 which comprised something over 1,600 acres of land, 320 of which belonged to appellee, Lightner. No complaint was made of any of the proceedings until the assessments for benefits came to be made. At that time various persons appeared before the board and filed objections to the proposed assessments, among them being Lightner, the appellee herein, against whose land it was proposed to assess the sum of \$3,327.48. Before the board of supervisors, Lightner filed objections, among which were the following, to the proposed assessment against each forty acres: “(b) That said assessment is excessive and not in proportion to the benefits said real estate will derive as compared with other real estate in said drainage district. . . . (d) That said assessment is inequitable.”

The board had a hearing upon these and other objections with the result that it made and confirmed the assessments in accord with the report of the commissioners, save as to an assessment against the land of one Bowers; his assessment being canceled and the total of the assessment made by the board was \$15,318.21. From the order of the board on the objections filed by Lightner, he appealed to the district court. When the case reached that court he filed a motion to cancel the assessments for certain reasons, and his motion was sustained. Appeal was then taken to this court, and the ruling of the district court was reversed and the cause remanded for a new trial. See 145 Iowa, 96. When the case reached the district court after remand, the board of supervisors filed a motion to strike all the grounds of objection filed by Lightner before the board for the reason that they were not sufficiently specific. This motion

was sustained, save as to those hitherto set out. The case then went to trial upon the merits of these exceptions, with the result that the board's assessment was confirmed as to three forties of Lightner's land, and materially reduced as to five of them. The board appealed from the decision of the trial court to this court, or at least attempted to do so. After the appeal was taken, Lightner paid the assessment made by the district court and the board received the same, giving receipts therefor, which in effect reserved all rights of the county and the drainage district. At the outset we are met with a motion to dismiss the appeal because no proper notice thereof was given, and for the further reason that, as the county and the drainage district has accepted the benefits of the decision of the district court, it has either waived its right of appeal or can not further prosecute the same.

I. The defects in the notice of appeal can only be shown by a quotation therefrom, which we here make: "In the Supreme Court of Iowa. (Title of case is correctly stated.)

1. DRAINAGE: Notice of appeal—To C. P. Lightner and
notice of ap- Howard and Howard, his attorneys, and
peal: service Joseph Lampman, clerk of said court: You
of notice. are hereby notified that the board of supervisors of Greene county, Iowa, representing and in behalf of drainage district No. 7 in Greene county, Iowa, have appealed from the judgment and decision of the district court aforesaid, rendered against them, and in favor of the plaintiff in this cause reducing the amount of assessment made against the lands of the plaintiff in said drainage district entered in said court on the 12th day of December, 1910, to the Supreme Court of Iowa. Said appeal will come on for hearing in its regular order at the May term, 1911, of said Supreme Court, commencing at Des Moines, Iowa, on the first Tuesday after the first Monday in May, 1911. Wilson & Albert, attorneys for the above-named appellant." The sole defect, or the only one which will bear argument, is

in the caption: "In the Supreme Court of Iowa." This was manifestly a clerical error and may well be regarded as surplusage. So treated, enough remains to indicate the judgment and order appealed from. *Douglass v. Agne*, 125 Iowa, 67; *Crane v. Brannan*, 3 Cal. 192; *Hanna v. Russell*, 12 Minn. 80 (Gil. 43); *Tallman v. Hinman*, 10 How. Prac. (N. Y.) 89.

The notice need not be addressed to the clerk of the district court by name. *Bloom v. Traction Co.*, 148 Iowa, 452.

Service was accepted by Joseph Lampman, clerk of the district court of Greene county, Iowa, and the notice was filed by him. This was sufficient. See *Bloom* case, *supra*.

The defendants through the county treasurer accepted the amount of the assessment made by the district court which was paid after the appeal was taken here, but this was done with a reservation of the right of appeal, and the defendants did not waive their rights of appeal by accepting the assessments so paid. *Mountain v. Low*, 107 Iowa, 403; *In re Youngerman*, 136 Iowa, 488. The motion to dismiss the appeal must be overruled.

2. APPEAL:
waiver of
right.

II. Coming now to the case. The first error assigned is the ruling on the motion to strike the objections filed by Lightner before the board of supervisors. The case in the district court and upon the appeal must be tried upon the objections filed before the board and these must be reasonably specific.

3. SAME: assess-
ment of bene-
fits: objec-
tions: suffi-
ciency.

But as they are filed in the first instance before a board exercising *quasi* judicial functions, not as a rule versed in the refinements of pleading, they need not be more specific than the ones here filed. It is enough if they fairly suggest the objections which the complainant has to the assessments against his property. Such objectors need not set forth the evidence upon which they intend to rely

nor challenge each and every assessment made. If the real grounds of the objections are fairly apparent, this is sufficient. On appeal he is confined to such objections as he filed before the board, and when the case reaches the court the real question is, What objections were made before and considered by the board. They may be couched in such general or ambiguous language as not to present any valid objection for the reason that they do not direct the mind to any real issue, but, if they fairly point out the claim made, they should be allowed to stand and be heard by the court upon appeal.

We think the objections set out were sufficient to raise the questions which were in fact tried by the district court; that is to say, the amount of benefits received by each forty acres of plaintiff's land, as compared with the assessment of benefits against other tracts in the district. Even if the last objection be held insufficient, it did nothing more than emphasize the first one and in no manner broadened the issue tendered by the prior one. There was no prejudicial error in the ruling on the motion to strike.

The real questions presented by the objections, and the only ones which may be considered on appeal, are these: (a) Was the apportionment equitable? (b) Did it exceed the benefits conferred? *In re Farley Dist.*, 140 Iowa, 339; *In re Jenison*, 145 Iowa, 215.

III. Before the establishment of the district in question, plaintiff's lands, or at least a large part of them, and particularly that part whereon the assessment was reduced, was in a drainage district known as the
 4. SAME: appeal: burden of proof. Dawson township open ditch. The main ditch of this system touched each and every forty acres of land upon which the assessment was reduced, and Lightner had by tile drains, which ran into this open ditch, practically reclaimed all the lands in each and all of these forty-acre tracts. There was a small swamp upon the N. W. of the N. W. of section 13, and some of the

land therein was wet; two very much smaller ones on the N. E. of the N. W. The N. W. of the N. E. was practically all drained out, as also was the S. W. of the N. E., and but little of the S. E. of the N. W. was either wet or swamp. The amount of the assessment made against these forties and the reduction made by the trial court is shown by the following taken from the finding of the trial court:

Ratio on basis of 100 points.	Description. Parts of section.	No. Acres Swamp-Wet-Low-High and drained.	Assessment by Bd. Spra.	Assessment as now fixed by this court.
11.51	N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	5 35	\$ 325.65	\$ 95.97
6.91	S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	3 37	287.47	57.58
11.18	N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	4 2 34	421.10	93.22
16.44	N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	5 1 30	483.92	137.10
4.6	S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	2 38	417.59	38.39

The facts so far recited are practically conceded; but appellants contend that the trial court erroneously reduced the assessments, as shown, for the reason that no competent testimony was adduced to justify the same. This is a mistake, we think, and without pointing out the admissible testimony bearing upon the issues presented, it is enough to say that Lightner did introduce testimony which would justify a reduction of the assessments made against his property, and in fact produced about all the testimony which could be produced on such an issue. The amount of the assessment against all the other lands within the district was before the court, and the nature and character of these lands were described. Lightner produced testimony as to the effect of the new drainage system upon each forty and had competent engineers not only go over the ground, but made assessments based upon the statutory method.

The trial court adopted the assessments recommended by these experts, and about the only question we can consider under this record is whether or not the trial court was in error in doing this rather than confirming the assessments made by the board upon the report of its commissioners appointed for that purpose. Appellants say that

we must, on this appeal, start with the assumption that the assessment recommended by the commissioners and con- this is the rule which should be adopted by the district burden of showing the incorrectness thereof and the just amount for which his lands should be assessed. Doubtless firmed by the board was correct, and that appellee has the court. But there is also another rule which appellant has overlooked, and that is, there is a presumption not only that the district court observed this rule, but that its finding also is correct. After all, on such appeals the appellant has the laboring oar. After a careful consideration of the entire record, the only doubt we have is as to the correctness of the reduction of the assessment against the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 13. The other reductions seem to us to be amply justified by the testimony.

As usual, the testimony is not wholly satisfactory, and at best these assessments can be nothing better than an approximation. As to the two forty-acre tracts in question, we have carefully considered the testimony with reference thereto. Lightner's buildings and improvements are and have been for many years upon the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 13, and we are satisfied after a careful perusal of the record that the trial court did not err in reducing the assessment on this forty as shown.

There is more difficulty with the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$. Lightner admitted while on the witness stand a benefit of \$150 to this forty, yet the trial court found it

5. SAME: assess-
ments:
validity.

to be but \$137.10. There is testimony, however, that this forty has been flooded more since the new drainage system was put in than before, but also evidence to the fact that this was only during the wet seasons. There was also a line of fifteen-inch tile running practically the entire length of the forty, and in the assessment made or confirmed by the board the entire expense of the tile upon this land was

taxed against the forty acres. This of course was wrong, and the trial court was justified in canceling an assessment based on that basis. Comparing the assessment here with other assessments in the district, we have reached the conclusion that it should have been assessed to the amount of \$275, and that the trial court was in error in reducing this to the sum of \$137.10. Doubtless the reduction was made on account of floods happening since the district was established, but it is also shown that these were extraordinary and largely due to surface drainage. This particular forty acres had not been satisfactorily drained out before the new district was established, and the amount of wet land upon it was larger than upon many of the other forties.

We have done the best we can with the record before us to arrive at a proper conclusion, and reach the result above indicated after a most careful consideration of the testimony. It follows that the order of the trial court should be modified as to the assessment against the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 13, making it \$275 instead of \$137.10. Otherwise it will be confirmed. Appellee will pay one-fourth of the costs of the appeal and appellants three-fourths.—*Modified and affirmed.*

SUPPLEMENTAL OPINION.

WEDNESDAY, SEPTEMBER 25, 1913.

PER CURIAM.—In writing the opinion filed herein, the matter of interest on the assessments which was referred to briefly in the arguments filed for appellant, was overlooked and in a petition for rehearing the matter is again brought to our attention.

The trial court in its decree in effect refused to allow interest on any of the assessments, although confirming some of them, but decreed that the assessments fixed or approved by it should be placed on the tax books, and unless paid by

March, 1911, then the same should be delinquent and be subject to the interest and penalties provided by law. This order in so far as it denied interest on the assessments was as we think erroneous. The assessments should have drawn interest from the time the assessment was made by the board, and the decree should be so modified. The latter part of the decree fixing the time of payment, etc., became inoperative because of the appeal, and upon remand a new time should be fixed when the payment of the amount due on the assessments shall become delinquent, in order that the sum so found due, if not paid forthwith, may be collected as provided by law. In fixing the amount due payments already made should be properly credited. The effect of this holding is to add an additional modification of the decree to the extent indicated, and the case will be remanded for a final order and decree in the district court in harmony with the original opinion and this further modification.

The petition for rehearing will otherwise be,—*Overruled.*

SADIE J. ELWOOD, Appellant, v. BOARD OF SUPERVISORS OF SAC Co.; BOARD OF SUPERVISORS OF CALHOUN Co.; DRAINAGE DISTRICT No. 20 CALHOUN Co.; DRAINAGE DISTRICT No. 119 CALHOUN Co., Appellees, and S. L. WATT, Appellant, v. Same Defendants.

Drainage: APPEAL: STATUTES. An appeal in drainage cases is perfected by filing a notice and giving a bond; all other statutory proceedings, the filing of a transcript, payment of fee, docketing the case and the filing of pleadings, have reference to procedure after the appeal has been taken.

Same: DISMISSAL OF APPEAL. The statute requiring a party appealing from the establishment of a drainage district to file, among other things, a petition setting forth his claims and objections on or before the first day of the next succeeding term of the district court, and providing that failure to comply with the re-

quirements will work a dismissal, is remedial and should be liberally construed, to assist and effectuate justice between the parties: So that where by mistake, accident or neglect, the appellant, having complied with all other requirements, neglected simply to file his petition, until the second day of the term, but before a ruling on a motion to dismiss on that ground was made, a dismissal should not have been entered; as the neglect was in no sense jurisdictional, and could be excused.

Appeal from Sac District Court.—HON. Z. A. CHURCH,
JUDGE.

MONDAY, JUNE 10, 1912.

APPEALS from orders dismissing appeals taken by the plaintiffs from awards of damages due to the establishment of a drainage district to the district court of Sac county. —*Reversed and remanded.*

Elwood & Stanfield and L. H. & B. I. Salinger, for appellants.

R. L. McCord and John W. Jacobs, for appellees.

DEEMER, J.—The boards of supervisors of Sac and Calhoun counties established certain drainage districts within the said counties, and in due season the plaintiffs in these cases filed, with the proper boards, claims for damages on account of the establishment and location of said districts. These claims were heard by the boards and allowances made thereon; the record being made on April 27, 1910. Thereafter and on May 16th each of the claimants appealed to the district court by giving notices and filing the requisite bonds. The next term of the district court of Sac county commenced on October 24, 1910. Within due season the auditor of Sac county filed a transcript of the record, including notices of appeal and bonds, with the clerk of the district court. Plaintiffs neglected to file petitions in the

district court on the day the term opened, and on the next day, to wit, October 25th, defendant filed motions to dismiss the appeals because petitions were not filed within the time allowed by law and "by reason thereof the plaintiff has waived said appeal." On the day the motions were filed and before the same were ruled upon, plaintiffs in each case filed proper petitions in the district court, and at the time of filing the court granted each plaintiff time in which to file affidavits of merits. These were filed on October 31, 1910, and on the same day amended and substituted petitions were filed. Still later and on November 3, 1910, plaintiff filed resistances to defendant's motions to dismiss the appeals. In support of these objections to the motions to dismiss and of their claim to have the case retained upon the docket for trial, each of the plaintiffs showed that failure to file their petitions in time was due to mistake and oversight on the part of the attorney in charge of the matter; that he prepared the petitions and supposed he had filed them with other papers; that he did not learn to the contrary until informed by his partner of the motions to dismiss; that this was on the morning of the second day of the term, and that he immediately prepared and filed the petitions before the convening of the court on the afternoon of the second day; and that he never intended to waive or abandon the appeals.

Upon this record the trial court sustained the motions to dismiss, and plaintiffs in each case have appealed. The records in the cases are identical and, while the cases were not consolidated, they will be disposed of in one opinion.

It is conceded that plaintiffs did everything required of them to get their cases into the district court and to have them there heard save to file petitions therein with the time required by statute. The statutes with reference to these appeals, so far as material, read as follows:

Any person or persons aggrieved shall have the right to appeal in the same time and in the same manner as

provided when the district is wholly in one county. . . .
If said appeal is from the award of damages . . . the
appeal shall be taken to the district court of the county
in which the land affected is located. Notice of appeal and
bond shall be given to and filed with the county auditor in
the county where the appeal is taken. (Code Supp. section
1989-a35 as amended by Acts 33d Gen. Assem. c. 118.)
Any party aggrieved may appeal from the finding of the
board . . . in the allowance of damages to the district
court by filing notice with the county auditor at any time
within twenty days after such finding, at the same time
filing a bond with the county auditor, approved by him, and
conditioned to pay all costs and expenses of the appeal un-
less the finding of the district court shall be more favorable
to the appellant . . . than the finding of the board.
If the appeal is from the amount of damages allowed, the
amount ascertained in the district court shall be entered of
record, but no judgment shall be rendered therefor. The
amount thus ascertained shall be certified by the clerk of
said court to the board of supervisors, who shall thereafter
proceed as if such amount had been by it allowed the
claimant as damages. (Code Supp. section 1989-a6, as
amended by Acts 33d Gen. Assem. c. 118.)

When an appeal authorized by this chapter is taken,
the county auditor shall forthwith make a transcript of
the notice of appeal and appeal bond and transmit the same
to the clerk of the district court, and the clerk shall docket
the same upon payment by the appellant of the docket fee;
and on or before the first day of the next succeeding term
of the district court the appellant shall file a petition setting
forth the order or decision appealed from and his claims and
objections relating thereto; a failure to comply with these
requirements shall be deemed a waiver of the appeal and in
such case the court shall dismiss the same. (Code Supp.
section 1989-a14, as amended by Acts 33d Gen. Assem.
c. 118.)

From a reading of these it will be noticed that the
appeal is perfected by the filing of notice and the giving of
the bond. All the other requirements have reference to
procedure after the appeal is taken. These are (1) the
auditor must make and file a transcript; (2) upon payment

by appellant of a docket fee the clerk must docket the case; and (3) the appellant on or before the first day of the next succeeding term must file a petition, etc., and the statute then says that "a failure to comply with these requirements shall be deemed a waiver of appeal, and in such case the court shall dismiss the same." Plaintiffs each performed each and all of these requirements save that their petitions were not filed until noon of the second day of the term. The delay in filing is excused, however, as heretofore indicated. No ruling had been made on the motions to dismiss when the petitions were filed, and the district court clearly had jurisdiction of the cases. They were upon the docket for determination on their merits, and the sole question for our determination is what effect should be given plaintiff's failure to file petitions on the first day of the term. Going not to the jurisdiction of the court, but having reference to procedure after the appeal is perfected, the statute is open to construction and the objects and purposes thereof may be considered in arriving at a proper rule for such cases.

The dismissal is a penalty for not taking the steps required, and in view of that fact the statute should be given a strict construction in order to avoid the penalty imposed.

Section 3446 of the Code provides that "all provisions (of the Code) and all proceedings under it shall be liberally construed with a view to promote its object and assist the parties in obtaining justice." Appellees would have us hold that a failure to perform any of the three requirements hitherto mentioned should be treated as a waiver of the appeal and result in a dismissal, while appellant contends that the statute refers to every requirement, and unless there be a failure to comply with all there should be no dismissal. There are analogous authorities which seem to sustain appellants' contention in this regard. *Vasey v.*

1. DRAINAGE:
appeal:
statutes.

2. SAME:
dismissal of
appeal.

Parker, 118 Iowa, 617; *Born v. Home Ins. Co.*, 110 Iowa, 379; *Phoenix Ins. Co. v. Lorenz* (Ind. App.) 29 N. E. 604. Aside from this, however, we are very clearly of opinion that the motion to dismiss should not have been sustained. The statute is a remedial one and should be so construed.

The petitions were filed immediately upon the discovery of the mistake or neglect and before the motions to dismiss were ruled upon. They were in time to answer every requirement of the law, and, while the statute fixes the time when the petition shall be filed, failure to comply may be excused and the case retained for trial. As supporting these views, see *Hinman v. Weiser*, 9 Iowa, 562; *Squires v. Millet*, 31 Iowa, 171; *Vasey's case, supra*; *Simons v. Railroad Co.*, 128 Iowa, 146; *Cole v. Laub*, 35 Iowa, 590; *State v. Glass*, 9 Iowa, 325.

In *Bacon v. Black*, 38 Iowa, 162, it is said: "The failure to pay the change of venue costs by the exact time required should not, where no prejudice has resulted, or could result, bring about a denial of justice while the failing party stood ready and offering a substantial compliance with the law."

In *Hinman's case, supra*, the court said: "Rules of this nature are intended to promote vigilance. In the present instance it is to insure promptness in the prosecution of the appeal, and, this being effected, the motion can not go back and nullify the defendant's action and prevail the same as if the defendant has not performed the required act."

In passing upon a like statute the Supreme Court of Minnesota said *In re Brady's Estate*, 70 Minn. 437 (73 N. W. 145): "There was complete jurisdiction of the appeal without entry upon the calendar, and such requirement as to entry is intended to speed the cause and not to take away from the district court all discretion to relieve the appellant from his default in not complying with the

statute for good cause shown. It is further said that this requirement 'is made to the end that the appeal may not be dismissed but be heard and determined on the merits.' That while the right to dismissal is *prima facie* absolute, the power and discretion remain to refuse dismissal and to direct the case to be placed upon the calendar for trial."

Unless the requirement be jurisdictional, the uniform tenor of the authorities seems to be that, if the step required be omitted by mistake, accident or neglect, it may be cured after motion is made provided it be done before the motion is decided. *Trapp v. Bank* (Ky) 43 S. W. 470; *Mendenhall v. Elwert*, 36 Or. 375 (52 Pac. 23, 59 Pac. 805); *State v. Rightor*, 50 La. Ann. 113 (23 South. 200). Our own cases hitherto cited maintain this rule. See, also, *Dye v. Augur*, 138 Iowa, 538; *Free v. Tel. Co.*, 135 Iowa, 74; *Covell v. Mosley*, 15 Mich. 514; and *Fleischner v. Bank*, 36 Or. 553, (54 Pac. 884, 60 Pac. 603, 61 Pac. 345).

The cases relied upon by appellee all relate to failure to take some step to give the court jurisdiction and not as in this case to some matter of procedure after the court acquires jurisdiction. We need not cite them as they are not regarded as controlling.

It follows the order of dismissal entered in each case must be and it is reversed and each remanded for proceedings in harmony with this opinion.—*Reversed and remanded.*

BENJAMIN HARRIS v. DAN LEWIS, Appellant.

Boundaries: LOCATION BY AGREEMENT: EVIDENCE. The statements of I a lot owner that he was satisfied with the boundary as indicated by the line of the sidewalk, made at a time when neither party supposed he was agreeing to the location of a disputed boundary, were mere expressions of opinion and insufficient to establish an agreed line.

Same: ACQUIESCENCE: ESTOPPEL. Where a boundary line as marked

2 by a sidewalk and by a terrace was not established by acquiescence,
the making of improvements at slight cost with respect thereto,
which were in no manner induced by anything said or done by
defendant, and which could be removed without injury to the
land, would not estop the defendant from claiming to the true
line.

Same: LOCATION OF STREET LINES: EVIDENCE. It will not be assumed
3 that trees planted along the streets in cities and towns are on
the line of the street, in the absence of proof of that fact, as
common observation is otherwise.

Same. Long continued occupancy of city lots with improvements
4 according to the street lines and corners, as marked at the time
the plat was filed, is better evidence of their correct location
than the measurements of a surveyor based on assumed corners.

Appeal from Iowa District Court.—HON. R. P. HOWELL,
JUDGE.

MONDAY, JUNE 10, 1912.

SUIT to enjoin defendants from erecting a fence along
the south line of and otherwise improving a strip of ground
eight or ten feet wide. On hearing, decree was entered as
prayed.

The defendant appeals.—*Affirmed.*

Yoss & Wallace for appellant.

R. W. Pugh and *Popham & Havner* for appellee.

LADD, J.—The plaintiff owns the south ninety feet
of the north ninety-five feet of lot 2 in block 11 of William's
addition to Williamsburg, and the defendant owned the
north five feet of said lot 2 and the south thirty-seven feet
of lot 1 in the same block lying immediately north of lot
2. Osborn, owning the land north of defendant's, con-
structed a cement sidewalk, and plaintiff did likewise im-
mediately after acquiring the tract, and then defendant

put in a like sidewalk forty-two feet long between the walks of Osborn and plaintiff. Kelly, who conveyed the respective tracts to the parties hereto, had owned them since 1885, and the boundary to the north, between that of defendant and Osborn though not very well defined by existing monuments, appears to have been acquiesced to by the adjoining owners for a period longer than that of the statute of limitations. The plaintiff also constructed cement curbing at the rear of his lot and set out cement posts on which wire was stretched, extending to near the line as claimed by him but leaving space for a gate partly on defendant's land. The front yard was also improved.

The plaintiff's agent, Hull, testified that defendant expressed himself several times as being content with the line as indicated by the sidewalk, being about a foot north

from the bottom of the terrace on plaintiff's premises. This was denied by defendant. The issue is not material, for, if the latter did say all attributed to him, he but expressed opinions and neither party supposed they were agreeing upon the location of a disputed line. *Jordan v. Ferree*, 101 Iowa, 440.

Until the survey by Blaiser in 1910, defendant undoubtedly thought the division line was where plaintiff now claims it to be. According to that survey, the true boundary would be eight or ten feet south of where the parties had supposed, and defendant proceeded to remove some trees and erect a fence on a boundary in harmony with the survey.

From this recital of facts, it is apparent that the line between the parties as marked by the sidewalk and less definitely by the terrace was not established by acquiescence, and that as the improvements made by plaintiff were not induced by anything said or done by defendant, and as these were of small expense and might be readily

2. BOUNDARIES:
location by
agreement:
evidence.

2. SAME:
acquiescence:
estoppel.

removed without injury to the land, defendant is not estopped from claiming up to the true boundary even though considerably south of where this was supposed to be. Before proceeding it should be said that defendant now is in possession of the area purchased by him—that is, a strip forty-two feet wide—and, as division line on the north probably has been established by acquiescence, all added by extending his premises to the south will be in excess of such area. On the other hand, there was no showing of the establishment of a division line south of plaintiff's ninety-foot strip and, for all that appears, the new survey merely pushes his line farther south than it was supposed to be. This much is said to dispose of the so-called equitable considerations which counsel have pressed on our consideration. The plaintiff is entitled to continue in possession of the strip of ground in controversy and have this protected against trespass by defendant unless it appears from the evidence that the true boundary is as shown by the survey. No evidence of the original monuments marking lines and corners of the plat of William's addition was adduced. This plat was filed in 1856 and is said by the surveyor to be "the southeast quarter of the southeast quarter of section 9 in township 79 north, range 10 west, Iowa county, Iowa." Neither the size of the lots and blocks nor the width of the streets is indicated thereon. No measurements are given, and nothing therein directs attention to any previous plat from which these might be inferred. The surveyor assumed an iron rod driven into the ground to mark the southeast corner of the section. It had been so reputed for at least twenty years, and all surveys in that vicinity had commenced there. A stone at the southwest corner of the southeast quarter of the southeast quarter of the section was equally well established and from the line between these measurements were made and the line as contended for by defendant located. The surveyor testified that "the size of the lots and blocks in William's addition

have been ascertained in connection with the corner at the southeast corner of the section and the corner to the west and the corner north. The William's addition covers a rectangle of 1,320 feet each way, and the description of the property, according to the congressional survey, is the southeast quarter of the southeast quarter of section 9 and William's addition to Williamsburg includes the entire southeast quarter of the southeast quarter of said section. The streets and alleys are recognized the same as shown in this plat. The streets in William's addition as they are actually laid out and platted by the public are all sixty feet wide with the exception of State street, and it is eighty feet wide. The blocks in William's addition are 320 feet square, and these blocks are divided into four square lots of 160 feet each."

What is here meant, as appears from other testimony, is that, in the practical location of the streets and blocks, this has been assumed and, as appears from the record, has resulted from computation and comparisons with other plats. There is a row of maple trees at or near the south line of lot 2 in block 11, but, if these are on the line as the surveyor thought, the north line of lot 1 at its northeast corner in that block is five and one-quarter feet too far north, and the southeast corner of lot 2 about three feet too far north also.

But it can not be assumed in the absence of evidence that trees are planted on street lines in towns and cities when common observation indicates the contrary. The surveyor admitted it to be impossible to ascertain the lot lines from the plats, and these were not indicated by visible monuments save in improvements subsequently placed on the several lots. The sidewalk along the north side of block 11 and on to the east is not straight, and bends are found in other walks. It is manifest from this recital of conditions that the survey as made was inadequate as evidence of the

3. SAME: location
of street
lines: evi-
dence.

location of the true boundary lines of the lots in block 11 or of that between the premises of the parties hereto.

The long occupancy of the lots and improvement thereof in accordance with lines and corners which may have been marked at the time the plat was filed is better evidence that these are correct than the deduc-

4. SAME.

tions and measurements of a surveyor regardless of his competency and experience. See *Bevering v. Smith*, 121 Iowa, 607; *Seberg v. Bank*, 141 Iowa, 99.

The court rightly held the evidence insufficient to establish the location of the true line as contended by defendant, and its decree, permanently enjoining him from encroaching on premises occupied by plaintiff, is—*Affirmed*.

EVANS, J., took no part.

BARNEY McCARNEY, by L. A. LECLAIRE, his next friend,
v. BETTENDORF AXLE COMPANY, Appellant.

Master and servant: GUARDING DANGEROUS MACHINERY: FACTORY ACT:

1 CONSTRUCTION. Where specific descriptions in a statute of persons or things are followed by general words not so specific, the latter descriptions are to be construed as applicable to a class of persons or things alike or similar to those designated by the preceding specific descriptions; unless the specific words describe things of different classes, or include all things in their class, or an application of the rule would render the general words meaningless. The factory act providing that "all saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description shall be properly guarded," is construed as an exception to the general rule, in that the specific descriptions refer to machinery or parts of machinery different from one another, and therefore the term "machinery of every description" was intended to comprehend all machines of a character dangerous to employees operating them without proper guards.

2 Same. Wherever any machine is shown to be dangerous to employees when operated without proper guard, the requirement of the statute to guard the same becomes as mandatory as if the same was particularly described therein; and proof of its

operation unguarded makes a *prima facie* case of negligence. In the instant case the evidence is held to show a traveling crane is such a machine and requires guards.

Same. The fact that machinery is located some distance above the
3 floor will not relieve the master of the duty of properly guarding it, if of such a character that injury to employees is reasonably to be apprehended when required to work about it.

Same: CONTRIBUTORY NEGLIGENCE. The evidence in this case is held
4 insufficient to show as a matter of law that plaintiff was guilty of contributory negligence in placing his hand upon the track of a running crane.

Same: SAFE PLACE TO WORK: SUBMISSION OF ISSUE. It is also held
5 that the evidence was sufficient to justify a finding that some provision for warning plaintiff of the approach of the crane was necessary to render the place where plaintiff was at work safe, and hence a submission of the employer's negligence in this respect was proper.

Appeal from Scott District Court.—HON. D. V. JACKSON,
JUDGE.

TUESDAY, JUNE 25, 1912.

ACTION for damages resulted in judgment against the defendant, from which it appeals.—*Affirmed.*

T. A. Murphy, Cook & Balluff, and A. G. Sampson,
for appellant.

Ely & Bush for appellee.

LADD, J.—The only question raised on this appeal is whether the evidence was such as to justify the court in submitting the case to the jury on either of two grounds of negligence: (1) Was the defendant negligent in operating the crane without guards, fenders, or some device to give warning of its approach? (2) Was it negligent in operating said crane after the ordinary hours of work without notice to plaintiff that it would be so operated?

That the questions involved may be fully understood, it will be necessary to state the facts fully.

The defendant operates a factory for the manufacture of steel cars. To move these and other heavy material from place to place in its shop, it employs three electric cranes. These are hung on wheels which move on tracks which are different heights and extend north and south. They hang between the tracks with the top about even with the tops of the wheels, and the operator sits therein about six feet lower. The tracks for the large crane are twenty-four feet, those for the three-ton crane fourteen feet three inches, and those for the riveter crane eleven feet — inches above the floor, and all rest on posts or timbers attached to the main post supporting the building. Starting from the south, the first or riveter post is a "box set in the ground and fits exactly a nine-inch I-beam, and on the beam is a two 6 x 6 bolt and imbedded in concrete, and the beam stands a foot below the angles. The south rail of the riveter crane track is supported on top of these I-beams." The next or the post, of the large crane, is a six-inch by twelve-inch timber, eight and one-half inches north of the riveter post and immediately against a twelve-inch by twelve-inch post supporting the building. About nine inches from the top of the riveter post is a block between it and the large crane post. A bolt, running through the three posts mentioned, and this block, holds them together. North of the post supporting the building and four inches therefrom is a six-inch by eight-inch post which supports what is called the "three-ton crane." Between these posts and the tracks are I-beams, that on which the large crane moves being a fifteen-inch, on which the three-ton crane runs a twelve-inch, and on which the riveter crane is operated a nine-inch, I-beam. From the large crane post, and flush with its south side, are knee braces extending from a point on either side three feet five and three-quarter inches higher than the riveter crane track up to the track on

which the large crane runs, giving it longitudinal stiffness. The south side of the large crane post is eight and one-half inches north from the center of the riveter crane track. The three-ton crane track is two feet ten and three-quarter inches higher and three feet five and one-half inches north of the riveter crane track. A one and one-quarter-inch iron air pipe extends parallel with and seven and three-quarter inches north and three-quarter inch above the riveter crane track. It appears that, in operating one of these cranes, one employee sat in and directed it, while another followed on the floor fastening on whatever was to be moved, and when properly placed unfastening the same. In the morning of the day on which plaintiff was injured, he was directed by the shop foreman to follow the large crane, and did so until about five o'clock p. m.; it being operated in moving cars under frames to the riveter benches and then from there to the inspector's or painter's benches about twenty feet distant. At the time mentioned, the crane proceeded to straighten up some car under frames which had tipped over, when he was advised by the foreman that he would have to work till a quarter to eight o'clock that evening. After some other work, by direction of the riveter, he attached to the crane the riveter which had been let down for repairs, and, when it was raised to the riveter crane tracks, he climbed up the south post to the south track, set the south wheels with flange in groove thereon, and proceeded to the north rail to set the other side.

He testified:

After I was halfway across, I looked down the north hole and saw this sixty-foot crane standing about one hundred feet away from me. There was nobody in the crane; nobody around it. When these cranes are being operated, some one has to be in the crane to operate it. After I saw this crane, I turned to go over to the north girder of this small crane there. The wheels of this small crane were about two inches away from the rail. In order

to get them in, I had to pull it like that; had to have both wheels straight. There was an eight-inch I-beam with a four-inch flange to stand on there at that time. There was a rail in the center of this I-beam. In order to pull this wheel over into the groove, I had to take hold of something! There was not enough to stand on to hold me. The only thing that there was that I took hold of was this girder or rail of the north crane. That was the north crane I had seen standing there without anybody around it. I took hold of the edge of the rail of that north crane. Then I turned around and started to pull on this end and looked up to set this right. I could not hold onto the girder that I took hold of first. I could not hang onto the girder that this rail was on. There was not anything else there in my reach that I could hang onto except this rail on this north crane. Then, as I turned around, this crane passed over my hand. It did not make any noise; I didn't hear it until it went over me. It was about two minutes after I had seen this crane standing back there before it ran onto my hand.

It appeared that the person operating the large crane did so on signals from plaintiff and was lifting the north wheels of the riveter crane when being pulled over, and that plaintiff could not well have pushed this crane instead of pulling it to the north in order to set the wheels on the track. The witness testified farther that he was not warned that the three-ton crane would be moved that evening, and that he was not aware it would, but supposed the operator had quit for the day; that he did not know that it was not provided with a brush or fender in front of its wheels to remove everything from the track as the crane approached; and that had there been, and his hand had been removed thereby, he could have saved himself from falling by the use of his other hand. And quoting: "When I climbed up to this track, I was doing in the usual way the same work that I had been doing all day; that is, straightening out the object to be lowered by the crane and being ready to cast off the fastenings when the

time came. I had to climb up in the work of following the crane. I had climbed up on top of these car underframes also about ten minutes before they had tipped over. When the crane was doing the work, it required somebody to climb up and get hold of what they were to lift and to cast off from it. I was the one to do that. So this Matthews was calling on me because I was the man whose place it was to do this work."

Plaintiff was twenty years of age, but had worked at the Joliet Bridge & Iron Company heating rivets and where hand cranes on endless chains were used, after which he worked "firing a boiler" for a year. Then after a few months he was engaged by the Illinois Steel Company cutting bolts. For another company he bolted pieces to the cars, and his job was heating rivets which were carried where required by a hand crane, and later he helped fit, and then operated the air hammer which riveted the cars. He returned to the Illinois Steel Company for a time, where he seems to have merely carried oil for the engines. This company operated cranes like those of defendant, and he was shown how to do the work of following a crane by an employee of the latter before doing so alone.

Another witness, Greenwell, testified:

I know what appliances that are practicable are used in different establishments for the giving of warning of the approach of cranes generally. They are very different. Where a wheel is hung on a channel iron, if the channel iron extends beyond the wheel, there is usually a brush or broom intended for keeping anything off the rail. The distance in front of the wheel varies. Sometimes it is six, eight or ten inches past the wheel; they are constructed so different. If the wheel was an eighteen or twenty inch wheel, the brush would project about fifteen to eighteen inches. The effect of such a brush is that it would shove anything off the track. It is a practical device in general use. There is another construction where two fingers are bolted to the channel iron and extend out from eighteen to twenty inches with that brush or sweeper. Mostly all

cranes, or all firms that build cranes, they use a clamp so that, in case a wire was broke, or repairing the track, the track ain't safe to run on, they block a clamp right onto the rail so it will stop the crane there. That is to prevent it going any farther up than the block. Such a device as this is in general use for the purpose of stopping the crane if for any reason you did not want it to go any farther than a certain point. Such device is practicable for the protection of any one that is going upon the track of the crane, but they do not generally use it. There is no warning or signaling practicable and in general use as to the approach of a crane anywhere I know of except hollering, giving signals. In the large locomotive works, they use a whistle signal for handling the crane; that is, in giving warning of the approach of the crane.

One Kay, who operated the three-ton crane at the time of the injury, testified that he had done so for about three weeks; that the time in question was the only occasion when he was required to work over time; that at 5:45 o'clock he left the crane for the ground, but shortly afterwards, as directed, went into the crane and moved it about one hundred or one hundred and fifty feet to get end sills; that he was not instructed to keep a lookout for any one on the track, and from his position could not see anything on the rails unless he especially looked for it; that the crane was not equipped with brush or fender, and he did not know of passing over plaintiff's hand until after the injury.

I. The court stated the first ground of negligence as an issue, and in the fifth instruction propounded the question: "Did the defendant company operate an electric three-ton crane after regular work hours on or about August 3, 1909, unguarded and unprovided with fenders or other device for giving warning of its approach, and fail to take any steps to protect persons endangered thereby while doing the work in which plaintiff was engaged when injured, and, if so, did such action constitute negligence under the law?" This was followed by the ordinary defini-

tion of negligence, and, in the next instruction, the law of master and servant was expounded, but the statute concerning safety appliances was not alluded to, nor was the jury informed what bearing an answer to the question might have. From the statement of the issues in connection with the above instruction, the jury might very well have concluded that the issue was for their consideration, although paragraph 7 of the charge seems to have excluded every ground of negligence not referred to therein. The parties have fully argued whether the situation was such that the crane was required by the statute to be guarded, and, though appellee contends that the issue was not submitted, the question may as well be disposed of. The statute (section 4999-a2, Code Supplement) declares that: "It shall be the duty of the owner, agent, superintendent or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and wherever possible, machinery therein shall be provided with loose pulleys; all saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded."

Appellant first contends that a traveling crane is not a machine such as contemplated by statute, for that it is not of the kind specifically enumerated therein. The argument is that in construing the sentence, "All saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded," the doctrine of *ejusdem generis* should be applied.

1. MASTER AND
SERVANT:
guarding dan-
gerous ma-
chinery: fac-
tory act:
construction.

Where words of a particular or specific description in a statute are followed by general words which are not so specific or limited, the latter, according to this doctrine, are to be construed as applicable to persons or things of

kind or class alike, or similar to those designated by the preceding particular or specific words, unless another intention is manifest. It usually restricts an expression in the statute such as "all others" or "any others" to persons or things of the same kind or class of those previously particularly designated, for the reason that this seems necessary to explain the use of both the general and the particular words. Otherwise, the particular words might as well have been omitted, as these are included in the general; but, if the general be restricted to the same kind, then all are given effect. The mere statement of the rule, however, indicates that it is subject to exceptions, as where the particular words are of things entirely different from one another and are of a different kind or class, or where the particular words include all of a kind or class. The doctrine is resorted to only as an aid to ascertaining the legislative intent, and must give way when its application would have the effect of rendering words or language employed in a statute meaningless which but for it might be accorded significance. *McReynolds v. People*, 230 Ill. 628 (82 N. E. 945); *Brown v. Corbin*, 40 Minn. 508 (42 N. W. 481). Sutherland, in his work on Statutory Construction, observes that, "when the result of thus restricting general words would be that they would have no effect at all, they must be extended to things superior in quality to those enumerated." And further: "The restrictions of general words to things *ejusdem generis* must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called *ejusdem generis*. If the particular words exhaust a whole genus, the general words must refer to some larger class." Sections 278, 279. Other canons of construction are equally potent, and among these that the construction of a statute should be such as to give effect to the legislative

intent, and all words employed should be given their full meaning unless restricted by the context.

As said in *National Bank of Commerce v. Estate of Ripley*, 161 Mo. 132 (61 S. W. 588), with reference to the doctrine of *ejusdem generis*:

This is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule. It does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. It is a corollary to the first proposition above stated; that the statute must be construed to give effect to all its words. The rule itself must not be so construed as to defeat that purpose. While it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus*, there is nothing *ejusdem generis* left; and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case, the rule would defeat its own purpose. (See, also, *Gillock v. People*, 171 Ill. 307 (49 N. E. 712).)

It seems all but needless to point out that "saws" do not resemble "belting," and "cogs" can hardly be classed with "planers." Nor are "set screws" likely to be mistaken for "gearing." The particular things enumerated in our statute are of entirely different kinds or classes, and the general words might consistently be construed as adding another kind or class to those previously mentioned. Moreover, each particular word is so mentioned as to include all of the kind or class. Not merely "saws," but "all saws," are to be "properly guarded," and so as to "planers, cogs, gearing, belting, shafting, set screws." The several subjects are exhausted so that, if "machinery of every description"

were to be restricted to that of the kind previously enumerated, these words would add nothing and would be meaningless. This was recognized in *U. S. Cement Co. v. Cooper*, 172 Ind. 599 (88 N. E. 69), in construing a statute like ours, save "vats, pans" are included in the enumeration, where receding from the holding in *La Porte Carriage Co. v. Sullender*, 165 Ind. 290 (75 N. E. 277), the court said: "If all vats, all saws, all planers, etc., shall be properly guarded, that is the end of it. All vats, all planers, etc., mean vats and planers of every description that may be properly classified as such. The term 'all' qualifies each class or *genus* of things here specified, and we necessarily must imply that nothing remains of either class *ejusdem generis* for the general words of the phrase to embrace."

The rule was lucidly stated in *Ward v. National Lumber Co.*, 54 Wash. 304 (103 Pac. 1), though the statute of the state of Washington is more specific than that of Indiana or of this state. The complainant's left hand was caught between a grease cut and a friction wheel and torn off. The court, after quoting the statute providing "for reasonable safeguards for all vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, set screws, live rollers, conveyors, mangles in laundries, and machinery of other and similar description" (Laws 1905, c. 84, section 1). Proceeding:

The appellant invokes the rule of *ejusdem generis*, and insists that the friction wheel, not being specified in the factory act, and not being the same kind or *genus* as any of the machinery specially mentioned, does not fall under the head of machinery of other or similar description, and that therefore the assumption of risk attaches in this kind of a case. Considering the whole scope of the factory act and the evident intention of the Legislature, we are unable to reach the conclusion contended for by the appellant. There is no doubt that the general rule is that the general word must take its meaning and be presumed to embrace

only things or persons of the kind designated in the specific words; but, as said in 26 Am. & Eng. Ency. Law, page 610, the object of the rule in question being not to defeat, but to ascertain and effectuate, the legislative intent, it will not be applied where the application would be in the face of the evident meaning of the framers of the law. In other words, the maxim has no application where there is no room for construction, but only when the meaning is not apparent from the language itself.

And it is also said: "Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety; in such case the general term must receive its natural and wide meaning." This is peculiarly the case under our statute, where the specific words signify subjects greatly different from one another, vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, set screws, live rollers, conveyors, mangles in laundries, etc.; all, or nearly all, being machinery or parts of machinery of different character. We think, in the face of the statute, it would be doing violence to the evident intention of the Legislature to hold that the duty to guard the machinery in question was not imposed upon the mill-owner, and the testimony is undisputed that the machine could have been guarded without affecting the efficiency of its operation.

Enough has been said to indicate the reasons for our conclusion that the clause "machinery of every description" should not be restricted to the kinds or class particularly mentioned, but given the broad construction, evidently intended by the Legislature, as meaning all machines of a character dangerous to employees operating them or working in their vicinity. Machines or parts likely, if unguarded, to injure those operating or coming in contact with them, are particularly mentioned and directed to be "properly guarded," and by "machinery of every description" the Legislature undoubtedly intended machinery

not specifically enumerated, but which might reasonably be anticipated to cause injury unless provided with appropriate guards. See *Kimmerle v. Dubuque Altar Mfg. Co.*, 154 Iowa, 42.

As every one knows, a large percentage of machinery requires no shield against danger to workmen operating or near it, and this, as plainly appears from the statute when construed as a whole, was not contemplated

2. SAME. by the Legislature. When a machine, or machinery, however, is proven to be of a character such that injury therefrom to employees operating or near it is reasonably to be apprehended, then the statute exacting proper guards is as mandatory as though it had been particularly mentioned therein.

This necessarily results from the language of the statute, which is fairly susceptible of no other construction and proof that machinery is of the kind mentioned and is unguarded makes out a *prima facie* case of negligence. *Stephenson v. Brick & Tile Co.*, 151 Iowa, 371; *U. S. Cement Co. v. Cooper*, *supra*.

Manifestly, it was impracticable, if not impossible, for the Legislature to have enumerated all machinery which it intended to compel those operating factories to guard. Moreover, new machines are being almost daily added to those employed in producing an infinite variety of results. "The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function to produce a certain effect or result." *Corning v. Burden*, 56 U. S. 252 (14 L. Ed. 683); *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537 (18 Sup. Ct. 707, 42 L. Ed. 1136). It has also been defined as "an instrument composed of one or more of the mechanical powers and capable when set in motion of producing by its operation certain predetermined physical effects." *Frederick R. Sterns & Co. v. Russell*, 85 Fed. 218 (29 C. C. A. 121). Under these definitions, there can be no doubt that the

traveling crane is a machine, and the evidence was such that the jury should have found, as they did, that it is such a one as that injury is reasonably to be apprehended therefrom to those working in its vicinity unless it be provided with proper guards. Concerning the nature of these guards and feasibility of their use, there was no dispute.

But the crane was operated about fourteen feet above the floor. Was its location such as to relieve the defendant from the duty of providing it with proper guards? It

will be observed that the matter of location
 3. *SAME.* is not alluded to in the statute, for the very manifest reason that scarcely any machinery in a factory does not at times require attention and handling. The Wisconsin statute exacts that the machinery be "securely guarded or fenced," only when so located as to be dangerous to employees in the discharge of their duty," and decisions of that state are perhaps explainable because of this language. *West v. Mill Co.*, 144 Wis. 106 (128 N. W. 992); *Willette v. Paper Co.*, 145 Wis. 537 (130 N. W. 853).

In *Dillon v. National Coal Tar Co.*, 181 N. Y. 215 (73 N. E. 978), a shaft fourteen or fifteen feet high was held to be too high to be within the factory act, relying on *Glen Falls P. C. Co. v. Travelers' Ins. Co.*, 162 N. Y. 399 (56 N. E. 897), where the facts were that a revolving shaft extended through the building, fifteen or eighteen feet from the floor, at the end of which there was a collar to prevent an end thrust. This collar was fastened to the shaft by a set screw which projected about five-eighths of an inch from the collar and was immediately joining the bearing upon which the shaft revolved. Upon this bearing was constructed a small platform which was reached by a ladder, which was used only for the purpose of reaching the platform when necessary to oil the bearing. Jasmine ascended the ladder to the platform, as was his duty, and undertook to oil the shafting at the point of the bearing,

when his sleeve was caught by the set screw, and he was twisted around the shafting to his injury. The statute of New York, in requiring set screws to be properly guarded, is in the language of that of this state, and, in declaring that the jury might have found that the set screw was properly guarded, the court said:

The manifest purpose of the enactment was doubtless to give more force to the existing rule that masters should afford a reasonably safe place in which their servants are called upon to work. We think, however, that the Legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. What evidently was intended was that those parts of the machinery which were dangerous to the servants whose duty required them to work in its immediate vicinity should be properly guarded, so as to minimize, as far as practicable, the dangers attending their labors. Human foresight is limited, and masters are not called upon to guard against every possible danger. They are required only to guard against such dangers as would occur to a reasonably prudent man as liable to happen. *Cobb v. Welcher*, 75 Hun, 283 (26 N. Y. Supp. 1068). In this case, as we have seen, the shafting was located from fifteen to eighteen feet above the floor of the factory, and the collar containing the offending screw was at one end of the building high above and out of reach of the servants who were engaged in operating the machinery below. It could only be approached by a ladder, and the only necessity of approaching it at all was for the purpose of oiling the bearing under the shafting. It does not appear that any accident of this character had ever happened before at this bearing, or that it had ever occurred to any of the persons operating the factory that such an accident was possible or liable to occur. The statute does not attempt to specify how machinery shall be guarded otherwise than as 'properly guarded.' The necessity for the guard, and the character and description of the guard, must, of necessity, depend upon the situation, nature, and dangerous character of the machinery, and in each case becomes a question of fact. We think, under the evidence in this case, a question of fact was presented for the determination of the trial court,

and that it could not be held, as a matter of law, that the screw in question was not properly guarded.

The opinion proceeds as though the statute did not exist, but the conclusion as announced, though not so construed in *Dillon v. National Coal Tar Co.*, *supra*, is not unreasonable for the issue as to whether the location was a proper guard might well, under different circumstances, have been thought appropriate for a jury.

But the set screw was without guard, save that of location, and the performance of the duty of the employee, regardless of the location, exposed him to the particular peril against which the statute must have been designed to afford protection. As observed by the court, the intention of the lawmakers was not that every piece of machinery be guarded; but there is no room to doubt that such was the intention with respect to every piece enumerated in the statute. Nor has the Legislature designated the location at which a piece of machinery shall be placed in order to be within the statutory language, and there is no ground for saying that, where employees in the performance of their duties are exposed to the danger of being injured thereby, the proprietor shall be excusable for not providing proper guard whatever the location. This statute was not enacted merely as an expression of the common law, but as something in addition thereto, and to compel the proprietors of shops and factories to exercise something of that foresight and sagacity in the protection of their employees from injury which is habitually practiced in the achievement of business success. This subject in connection with the Dillon opinion was considered in *Casper v. Lewin*, 82 Kan. 604 (109 Pac. 657) where the court, speaking through Burch, J., said:

Taking up the argument of this opinion step by step, it may be observed that it proceeds upon precisely the same lines as if the statute did not exist. The practicability of safeguards for dangerous machinery does not depend on

the size of the factory or the number of pieces of machinery inside of it, but upon the nature of each machine. The question is: Is the machine or appliance of such nature that it is practicable to deprive it of its homicidal attributes and not destroy its usefulness? If so, it ought to be guarded, and all such pieces ought to be guarded, although a great many are assembled in one large building. The shaft bearing had to be oiled just as the crusher had to be operated, and the ladder and platform were provided for the purpose of conducting the oiler to the necessary place. The oiler was obliged to do the work of oiling the bearing in the 'immediate vicinity' of the set screw in the revolving shaft. The statute named set screws and shafting as appliances to be properly guarded so as to minimize the danger attending the labor of the oiler while at work in their immediate vicinity. It did not require superhuman powers, and would not have caused brain fog to foresee that a set screw projecting from a revolving shaft threatens danger to an employee obliged to work immediately adjoining them. The Legislature had that much pre-vision. That body put set screws and shafting in the category of dangerous devices to be properly guarded when in proximity to places where labor must be performed, and thereby established the measure of prudence to be exercised. The location of the shafting had nothing to do with the case. It made no difference whether the shafting were brought down to the floor, or the floor were taken up to the shafting by means of the ladder and platform. Of course, the shafting was out of reach of persons operating machinery on the floor and who had no business with it; but it was not out of reach of the oiler, who did have regular business with it. Since it was imperative that the set screw in the shafting should be approached, it was immaterial whether it were approached on a platform reached by a ladder or on the floor level. True, the only necessity for approaching the dangerous appliance was to oil the bearing; but that was a necessity just as much as attending to the crusher below, and, whenever the operation was performed, it was attended with danger. It is indeed true that a human being must be mangled before it occurs to some factory owners that a set screw in a rapidly revolving shaft is dangerous to the person who must work near it, and that is the reason why

the statute required it to be guarded. There was no dispute about the situation, nature, and dangerous character of the set screw. No attempt was made to meet the peremptory terms of the statute and provide a guard for it. That it was plaintiff's duty to bring himself in proximity to it was not questioned; consequently, there was nothing left but to declare that a statutory duty had been violated. No reasons other than those considered having been stated in support of the decision, this court is unable to follow it.

The traveling crane was far above the floor, but this alone did not obviate the necessity of proper guards. If its location was such as in itself to shield it from injuring those employed in the shop, this would suffice. But this is not necessarily so when the workman's duty in the course of his employment takes him within the danger zone, and this was reasonably to be expected in equipping the shop with the crane. The safety appliances are exacted by the statute quite as much for the protection of the oiler or repairer, who in mending other machinery occasionally is exposed to the dangers of coming in contact with machinery as those who operate or constantly work about it. The law does not discriminate between different employees or classes of employees, and if the proprietor of shop or factory would economize by omitting guards when the machine or parts of it, though seldom approached, are such that these are exacted by the statute, he must either stop the machinery when employees are exposed thereto, or provide adequate warning to these of the peculiar danger involved if he will shield himself from consequences in the way of damages.

As said in *Casper v. Lewin, supra*:

It may be conceded that one way of preventing injury from shafting, set screws, and other appliances is to locate them out of reach. But they are not out of reach whenever a workman's duty in the course of his employment takes him to them. Whenever such an occasion arises, the statutory duty to interpose safeguards between the workman and danger arises. Dillon was obliged to work where un-

guarded shafting in motion would seize his clothing. The Legislature had his situation in mind when the statute was framed. The foreman had the choice of stopping the machinery or running the risk of inflicting a personal injury in violation of law. He chose the latter course, the result followed which the Legislature had foreseen and had tried to circumvent, and the injured man ought to have recovered.

Such machinery by virtue of the statute, when not properly guarded and in operation, is unsafe to those whose duties bring them within the zone of danger, whether this be on the floor or many feet above it, and when employees are required, in the performance of their duties, to work above the floor in the proximity of machinery which but for its elevation must have been guarded, it is the master's duty to take all necessary precautions for their protection in rendering the place at which they are engaged reasonably safe.

Reverting to the statement of facts, it will be recalled that Kay, who was in charge of the three-ton crane, was not negligent. He was not aware that any one was working near the track over which it moved and had not been directed to keep a lookout which ordinarily was unnecessary, and he could not well have noticed plaintiff from his location when operating it.

Nor can it be said that plaintiff was at fault in taking hold of the track in order to pull the riveter crane over so the wheels would rest on its track. True, he might have stood with his face toward the three-ton crane, and in that situation would have observed its approach, or he might have caused the large crane to move the riveter crane opposite the post and could have seized it in order to pull the latter over, but he saw the three-ton crane with no one in or near it, and, as the time was after working hours, he quite naturally supposed it was stationary and danger was not to be ap-

4. SAME:
contributory
negligence.

prehended therefrom. In proceeding on this theory, he can not be said as a matter of law to have been negligent, and might have been found to have been performing the duty required of him in the manner which might reasonably have been anticipated by defendant.

If he was not, then the injury must be regarded as purely accidental, or caused by negligence in failing to warn him of the approach of the three-ton crane or in ordering him into a dangerous place in which to work. But the place was dangerous only because of movement of the unguarded crane, and for this reason all necessary to render it reasonably safe was timely warning of its approach. In other words, to render the place reasonably safe, provision for warning of the approach of the crane might have been found to have been essential, and, if so, its omission constituted negligence. The seventh instruction was in accord with this conclusion, the court saying:

5. SAME: safe place to work: submission of issue.

Was it negligence on the part of the defendant to operate such an electric crane as the three-ton crane in question after regular work hours, without any warning or instruction to the plaintiff in reference thereto? The answer to this question depends upon whether or not the defendant in the exercise of ordinary care should have reasonably apprehended that the plaintiff, engaged in the performance of his duty on or about the riveting crane and exercising ordinary care for his own safety, would be endangered by such operation of the said three-ton crane. Unless you find that the defendant should reasonably have apprehended such danger to the plaintiff or other workmen similarly employed, you can not find it negligent, and the plaintiff can not recover.

In *Michael v. Roanoke Mach. Works*, 90 Va. 492 (19 S. E. 261, 44 Am. St. Rep. 927), an employee was directed to empty certain oil pans fixed under a shafting about two and one-half feet below the track of a crane some twenty-five feet above the floor. To do this "he had to sit down

on the wall with his feet and legs hanging over the side of it, then hang his right arm across the rail, and with his left hand reach down and take off the buckets" or pans. When he was trying to unfasten the third pan, the crane, which he had supposed was standing, was run on his arm without any warning and crushed it. So operating the crane, regardless of a safety appliance law, without warning, was held to be negligence.

In *American Tin Plate Co. v. Smith*, 143 Fed. 281 (74 C. C. A. 419), a scaffolding had been hung from the roof near one of the girders or I-beams from twenty to twenty-five feet from the ground upon which workmen might stand while engaged in drilling holes through the said beam. Complainant, to reach the scaffold, climbed up a post; but, after working awhile, the tool used broke, and he was obliged to go down to have it mended. In doing so he worked his way along the beam with feet partly on its lower flange and his arm across the top to hold himself in position. "When he reached the post supporting the beam and which extended upwards to the roof, he threw one arm around the post, still holding the other across the top of the beam, but preparing to remove it in order to slide down on the post to the ground. While in this position, the crane moved along from the direction in which he had come, striking his arm without his having been warned of its approach," seriously injuring him. With reference thereto the Circuit Court of Appeals, speaking through Gray, J., said: "Was any provision made by the defendant to warn those within the danger of the approach of the crane, and, if not, was plaintiff informed that no such provision was made, and of the danger incurred thereby? Had he the right to assume that the defendant would provide for such warning, and to act accordingly? These questions were all involved in this second alleged ground of liability. The plaintiff was clearly entitled to have this ground of liability, as alleged in his declaration, considered,

and defendant was equally entitled to have the ground of liability correctly stated to the jury. For the reason that it was erroneously stated by the learned judge, the defendant should be accorded the opportunity to have the law and facts that are properly determinative of his liability presented to the jury."

Enough has been said to dispose of appellant's contention that McCarney was exposed to a transitory danger due to no fault of plan, construction, or lack of repair, and for this reason might not recover. All that plaintiff did in following the crane was of a transitory nature, and the mere fact that in the performance of his duty he was compelled to go from place to place did not exclude him from the protection of the statute exacting proper guards nor deprive him of the benefit of the rule exacting a reasonably safe place in which to perform his duties. The statute was not enacted for the workmen engaged in ordinary duties only. Were the question as to whether the protection designed by statute is or is not practicable or necessary for a particular class of employees a matter for determination of courts or juries in every case, confusion as to what is required would result, and the purpose of a beneficial law be largely if not wholly nullified. As the evidence that the machinery was of a nature exacting a guard and had none was conclusive, the only inquiry aside from that of contributory negligence was whether, in view of its location and the circumstances proven, the defendant in the exercise of reasonable care should have warned McCarney of the approach of the crane.

There was no error, and the judgment is—*Affirmed.*

GILBERT BROTHERS v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Carriers of freight: BREACH OF CONTRACT: TORT: PLEADINGS: PROOF.

- 1 An action for injury to livestock while in transit may be based upon tort, or upon contract, and if purely a tort action is alleged the party is confined in his proof to that specific breach of duty; but if a contract for shipment and its breach are alleged, even though enough is stated in addition to justify recovery for violation of a specific duty, still he is not held to proof of the particular wrong but may show any breach of the contract for safe transportation; and proof that the stock was delivered to the carrier in good condition and that it was in bad condition when it reached its destination, not apparently due to unavoidable circumstances, will establish a *prima facie* case of breach of contract and authorize recovery, irrespective of the allegations of tort.

Same: LIVESTOCK: LIABILITY FOR INJURY: RULES OF EVIDENCE. A

- 2 carrier is liable for loss or injury to freight during its transportation, not due to the act of God or the public enemy, its inherent nature or the act of the shipper, and as to these exceptions he may be liable for negligence; and whether the shipment be goods or livestock practically the same rules of evidence and of the burden of proof obtain. And where the loss is not due to the excepted cases, whether the action be for breach of contract for safe carriage, or for breach of a public duty to do the same thing, the carrier can not escape liability by proof of reasonable care.

Same: ACTION FOR NEGLIGENCE: PROOF. Proof that livestock was

- 3 delivered to a carrier in good condition and that it was in bad condition when it reached its destination will support an action for its injury while in transit, based solely on allegations of negligence; and where such facts are alleged proof of the same makes a *prima facie* case of negligence, which is not obviated by a further allegation that at some particular point on the route defendant was guilty of some specific act of negligence; as the same was not essential to plaintiff's case, but was covered and included in the allegations and proof of good condition on receipt by the carrier and bad condition at destination.

Evidence: MARKET VALUE. It is not reversible error to permit a
4 qualified witness to state the difference in value of cattle in the
condition in which they were delivered at destination and what
their value would have been if delivered in good condition, as
such difference in value is a mere matter of computation.

Same: BEST EVIDENCE. Where the record of the weight of cattle
5 was not admissible in evidence and there was no proof of its
correctness, the testimony of a competent witness of the gain
they had made from the date of purchase to the date of sale
was admissible, over the objection that it was not the best evi-
dence.

Appeal from Jefferson District Court.—HON. D. M.
ANDERSON, JUDGE.

TUESDAY, JUNE 25, 1912.

ACTION for damages to cattle shipped over defendant's
line of railway resulted in a judgment for plaintiff. The
defendant appeals.—*Affirmed.*

J. L. Parrish and J. H. Johnson, and Leggett & Mc-
Henry, for appellant.

Crail & Crail, for appellees.

LADD, J.—On September 22, 1908, plaintiffs purchased
thirty-three year-old steers at the Union Stockyards at
Chicago, Ill. and shipped them over defendant's railroad
to Perlee, Iowa, where they arrived the next day.

Damages thereto are sought to be recovered in this
action, the petition alleging that on the day named plain-
tiffs and defendant entered into a written agreement where-
in defendant for a valuable consideration undertook as
a common carrier to transport the cattle as above stated,
said contract being made in the name of Lee Live Stock
Commission Company as consignor on behalf of plaintiff,
and made a part of the petition; and further:

That the plaintiffs performed all the conditions and obligations of said contract to be performed by them and delivered said cattle to the said defendant company for shipment on or about the 22d day of September aforesaid in good order and condition; that the car containing said cattle was attached by the defendant to one of its trains and started for its destination, Perlee, Iowa; that at a station along its line, to wit, Blue Island, Ill., the defendant carelessly and negligently, and in violation of its obligations as a common carrier, switched back a train of cars against the car containing plaintiff's said steers with great force and violence, throwing a number of said steers off their feet and down, so that the other steers tramped on them, and that all of said cattle were severely bruised and injured by the severe jolt received from the collision of the train of cars against the car in which they were contained, so that they were delivered to the plaintiffs at Perlee in a bruised, injured, cut, skinned, and battered condition, two of the steers having broken legs, one having its foot severely cut, and one with a knot or bunch on its leg, and all being more or less cut, skinned or bruised and some severely injured; that plaintiffs were damaged thereby in the sum of \$200; that the injuries to plaintiffs' said cattle were caused solely and wholly by reason of the carelessness and negligence of the defendant, and without any negligence on their part contributing thereto.

All of this was denied in the answer. Evidence tending to show that the steers were delivered in good condition at the stock yards and were bruised and severely injured when they reached Perlee was adduced. Other than this, there was no evidence tending to show that the stock was injured at Blue Island, and, over objection that it was not relevant to the issues, evidence that the car was not bedded was received.

Appellant contends that this evidence was insufficient to make out a *prima facie* case, and that the court erred in receiving the evidence concerning the condition of the car; the theory of counsel's argument being that, as the petition specifically alleged negligence in handling the car

at Blue Island, there was no other issue to be determined. This thought is further expressed in the criticism of the sixth instruction, which informed the jurors that:

Common carriers are insurers of the safe transportation and delivery of live stock intrusted to them, except for a loss or injury occasioned by the act of God, the public enemy, or resulting from the disposition or natural propensities of the live stock transported; hence in this case you are informed that the defendant company was an insurer of the safe transportation and delivery of the thirty head of steers delivered by the plaintiffs to them at the Union Stockyards at Chicago, Ill., on the 22d day of September, 1908, and, if you find that said steers or any of them were injured during the transportation thereof to Perlee, Iowa, then the defendant company would be liable in damages for such injury, unless it shall establish by the preponderance or greater weight of the evidence in the case that such injury resulted and was occasioned by the act of God, the public enemy, or the disposition and natural propensity of the animal or animals injured, or by the acts of plaintiffs themselves.

The proposition is not that the evidence excepted to might not have been admissible and the instruction correct under a different pleading, but that the petition had narrowed the issue to a single ground; i. e., injury of the cattle by the rough handling of the car at Blue Island.

The defect in this proposition is that it overlooks the distinction as does appellant's argument between this class of cases involving the liability of a common carrier in the transportation of property and those bot-
tomed primarily on want of care. In the
latter the rule prevails that the injured party
having selected his ground for recovery must
stand or fall thereon, as appears from *Volquardsen v. Tele-
phone Co.*, 148 Iowa, 77, and other like decisions. But ac-
tions against a common carrier for injury or loss of property
during transportation are not primarily founded on the
negligence of the carrier. Thus it has been held that a

1. CARRIERS OF
FREIGHT:
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tort: plead-
ings: proof.

petition reciting that property when delivered to a common carrier was in good condition and when received by the shipper at its destination in bad condition, without specific allegations of negligence, and, in the absence of any more definite general allegation of negligence, stated a cause of action. *Swiney v. Express Company*, 144 Iowa, 342; *McFadden v. Ry.*, 92 Mo. 343 (4 S. W. 689, 1 Am. St. Rep. 721). As said, an action for damages in the carriage of live stock is not necessarily bottomed on tort. Recovery may be had on a breach of contract. The petition specifically alleged that the shipment was under contract, a copy of which was made a part of the pleading, and a breach thereof as indicated. Anciently it seems to have been thought the liability of a common carrier rested solely on a breach of duty owing by him to the public, but later the shipper was allowed to declare in assumpsit on the breach of an undertaking to carry and deliver safely. "In all actions formerly against carriers, and up until a very late time, it was usual to begin the declaration with an averment of the custom. . . . Declarations against carriers in tort are as old as the law, and continued until *Dale v. Hall*, 1 Wils. 281, when the practice of declaring in assumpsit succeeded; but this practice does not supersede the other." *Ansell v. Waterhouse*, 2 Chit. Rep. 1; 18 E. C. L. 227.

From the earliest period in the common-law practice, an action on the case, based on a breach of the carrier's duty to the public, might be maintained to recover for such loss or injury. Furthermore it is believed this was the only form of action which would lie prior to the year 1750; and the reason for this was that, under the strict principles of the common law, common carriers were considered the agents and servants of the public, and were bound to a measure of duty to the public entirely distinct from that arising on contract. . . . In 1750 the first departure from the long established practice of declaring in tort occurred. Goods delivered to a common carrier were injured

in transportation, and the plaintiff, instead of declaring in tort on the custom of the realm, declared in assumpsit on the undertaking to carry and deliver safely, and alleged as a breach of the undertaking that the goods were damaged by defendant's negligence. . . . The most exhaustive research of the authorities will show that the precedent for allowing actions of assumpsit in this class of cases has seldom or never been disapproved; and it is now a well-established rule that at common law the party injured may at his option bring assumpsit, counting on the nonperformance of the agreement which the carrier made with him, or he may bring case, and count upon the violation of the public duty which the defendant avers. . . . Finally, in declaring in case, so much exactness in pleading is not required as in an action of assumpsit. In declaring on a contract, plaintiff must prove it as he has laid it, but in declaring on a tort it is not necessary to prove his whole case. Though he fails in many of his particulars, yet, if he proves so much of it as leaves him a good cause of action, he will be entitled to recover. (3 Cyc. P. & P. 817 et seq.) In determining whether to bring action on the case or in assumpsit it was important under the strict rules of common-law procedure to bear in mind some distinctions between these forms of action. But the difference in form of allegation in the declarations on the case and in assumpsit is very slight, there being in each instance an allegation that defendant 'undertook and agreed,' the characteristic difference being that in the action on contract it is alleged that he did so upon consideration, while in the action in tort no such allegation is necessary. (6 Cyc. 513.)

It is manifest from these excerpts, all of which are well sustained by authority, that a shipper in a case like this may base his action on tort or on contract, and enough of the petition has been recited to indicate that the allegations therein are broad enough to include both. In other words, a complete cause of action *ex contractu* is stated, and, in addition thereto, enough to justify recovery because of breach of duty as a common carrier. In this state all forms of action have been abolished (sections 3425, 3557, Code),

and a party is required to prove no more than essential to entitle him to the relief sought. See sec. 3639, Code. It was only necessary then, in order to make out a *prima facie* case, to prove a breach of the contract to safely transport the stock, and this was accomplished by establishing that they were in good condition when delivered to the company at Chicago, and received by the shipper at Perlee in bad condition not apparently due to natural vices.

The rules concerning proof in the transportation of live stock are not materially different from those for the transportation of goods. This is pointed out in 6 Cyc. at page 376:

The general rule as to the common carrier liability with reference to the goods in his possession as a carrier, and regardless of any contractual exceptions, is that he is liable for all loss or destruction or of injury to such goods, not occasioned by the act of God or the public enemy.

2. SAME: live-stock: liability for injury; rules of evidence.

Therefore, where the loss is not due to the excepted cases, proof of negligence is immaterial, and the carrier can not escape liability by proving reasonable care and diligence. In the English cases, by which the rule of exceptional liability was first established, it was said that the carrier was an insurer of the goods as against all loss or injury not resulting from the excepted cases, and in some of the cases in the United States the term 'insurer' is used; but nothing more is meant by this expression than that the carrier is absolutely liable, with only the exceptions recognized in the rule as above stated. The general rule as to the carrier's liability is illustrated by cases holding the carrier liable for loss of goods by fire, water, or other accidental cause, or by negligence or wrong of the carrier's servants or third persons. However, in the fuller development of the rule of carrier's liability it has been held that he is not liable for loss or damage due to the intrinsic qualities of the goods carried or the act or fault of the shipper, and therefore the rule might now be more fully stated as being that the common carrier is liable for all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods,

or the act or fault of the owner or shipper; it being understood that as to all of these excepted cases the carrier may be liable by reason of his own negligence or that of his agents, servants, or employees.

The law as thus stated is fully sustained by the decision cited, and this additional is found at page 381:

Where the destruction of or injury to the goods is due to their inherent nature and qualities, or defects therein, the carrier is not liable if his own negligence did not occasion or contribute to the injury. And perhaps it may be stated as a general proposition that the carrier is not liable for loss happening from the operation of natural causes.

. . . In general, as already stated, a common carrier of live stock is subject to the same rule of liability as a common carrier of other goods or property, but, if there is loss or injury due to the peculiar nature and propensities of the animals, then under the principle stated in the preceding paragraph, the carrier is excused, unless the loss or injury could have been prevented by the exercise of reasonable foresight, vigilance, and care on the part of the carrier.

In the same volume at page 519, the learned author says further:

The rules relating to the burden of proof in case of transportation of live stock are in principle the same as those with reference to goods, but some particular questions arise in their application. Thus, inasmuch as the carrier is not liable for death of animals during transportation due to natural causes, or their inherent vice or natural disposition, mere proof that the animals died after delivery to the carrier and before the end of the transportation is not sufficient to establish liability, but the evidence must further show that the loss was due to human agency. But, if the loss or bad condition appears to have been due to human agency, then the carrier must show that it did not result from his negligence in order to escape liability on the ground that it was due only to delay or from causes within the common-law exemption or within a valid particular limitation. But this he may do by general evidence of care and diligence in the transportation.

(And at page 513): In many jurisdictions, it is said that the carrier relying upon an exception made by common law or contract must not only show that the loss or injury falls within exception, but also that it occurred without fault—that is negligence—on the part of the carrier; and it is especially so held with reference to a loss by fire, where that is a liability excepted in the contract. But the better rule, and one which seems to be supported by the preponderance of authority, is that, where the carrier shows the loss to be within an excepted cause either at common law or under a valid contract exemption, he is not bound to go further and explain the particular of the loss or injury for the purpose of showing that he was free from negligence in connection therewith, but that the burden of proving negligence such as will render the carrier liable notwithstanding the common-law or contract exception is on the plaintiff. This rule would seem to be especially applicable where the contract is that the carrier shall not be liable except in case of negligence, or that the shipment is at the owner's risk, or that the carrier shall not be liable for damages due to delay.

The authorities cited fully sustain the author, and we may add an extract from 3 Elliott on Evidence, section 1919:

It is said that the rules relating to the burden of proof in case of transportation of live stock are in principle the same as those with reference to goods, but some particular questions arise in their application. Thus inasmuch as the carrier is not liable for death of animals during transportation due to natural causes, or to their inherent vice or natural disposition, mere proof that the animals died after delivery to the carrier and before the end of the transportation is not sufficient to establish liability, but the evidence must further show that the loss was due to human agency. But, if the loss or bad condition appears to have been due to human agency, then the carrier must show that it did not result from his negligence in order to escape liability on the ground that it was due only to delay or from causes within the common-law exemption or within a valid particular limitation. But this he may do by general evidence of care and diligence in the trans-

portation. There is some conflict among the authorities as to the burden of proof in cases of loss or injury to live stock; but the prevailing rule, where the owner or his agent does not go with the stock, is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof rests upon the carrier to show that the loss or injury was not caused by his own negligence.

In addition to authorities from other states the learned author cites *McCoy v. Railroad*, 44 Iowa, 424, and *Chapin v. Railroad*, 79 Iowa, 582. In the *Chapin* case this court said:

As illustrating the complaints generally as to the instructions, it is said this instruction gives no rules as to the burden of proof. But the following, as taken from other instructions on the burden of proof in the case are given: 'Par. 3. Such are the issues made by the parties by the pleadings herein, and you are instructed that the burden is upon the plaintiffs, in order to entitle them to recover, to prove to you by a preponderance of the evidence all the material allegations of their petition which have not been admitted in defendant's answer, and substantially as set forth in the first paragraph of this charge.' The answer admitted the receipt of the cattle, except as to number admitted, their transportation, and set forth the facts as to their being lost in a storm, in fact, a *prima facie* right to recover, and it was only necessary for plaintiffs to show the number of cattle lost and their value. With the loss established by defendant as a common carrier, the burden shifted to it to justify the loss. *McCoy v. Railway*, 44 Iowa, 424.

Other decisions of this court are to the same effect, notably *Swiney v. Express Co.*, 144 Iowa, 342, and *Mos-teller v. Railway*, 153 Iowa, 390, in the first of which the pleading required and in the last the extent of proof exacted are somewhat fully discussed. Enough has been quoted and said to indicate that whether the action is for breach of contract to safely carry, or is based on breach of a public

duty to do the same thing, the presumptions arising from proof are the same as are also the rules with reference to the burden of proof. Indeed, little seems to remain of the distinction between actions *ex delicto* and *ex contractu* against common carriers. The issue of care exercised by the carrier arises only when the case is sought to be brought within some of the excepted perils. Plainly enough the proof was sufficient to make out a breach of the contract to safely carry, and as no more was essential to entitle the plaintiff to the relief asked, it is manifest that there was no error in the instruction given nor in receiving evidence of the conditions in which carried. In other words, the allegation of negligence may be treated as surplusage. This was done in *Sargent v. Birchard & Page*, 43 Vt. 573, where the court said:

It is not unusual to insert in a declaration averments which affect only the rule of care and negligence which should govern the case. Thus, declarations alleging the defendants to be common carriers and at the same time averring gross negligence on their part in the transportation of the goods are usual and well approved. In such cases a failure to prove the allegation of negligence is no variance, and the plaintiff may recover without such proof, provided the evidence shows a case under the general rule respecting the liability of carriers. On the other hand, if the plaintiff does prove the allegation of negligence, he may recover, even though there are circumstances limiting the responsibility of the carrier below the common-law rule. So, in this case, if the deed affects the rule of care, the declaration is aptly framed to give the plaintiff the benefit of it. So far as the sufficiency of the declaration is concerned, it is unnecessary to decide whether the deed has any effect upon the rule of care or not, because, if it does, the averments in respect to it are material, and if it does not, they are immaterial and to be rejected as surplusage and in either view the declaration would be sufficient.

The same view was expressed in *School Dist. v. Railway*, 102 Mass. 552 (3 Am. Rep. 502), where the authorities were reviewed.

The instructions criticised may be approved if the action be regarded as based on allegations of negligence alone. In such a case, as appears from *McCoy v. Railway*, 44 Iowa, 424; *Chapin v. Railway*, 79 Iowa, 582, and other like decisions, as well as the recent case of *Mosteller v. Railway*, 153 Iowa, 390, all necessary to justify an inference of negligence was proof that the cattle were delivered to defendant in good condition, and when received by the shipper at their destination were in bad condition, not apparently due to inherent vices. "This is on the theory," as said in *Mosteller's* case, "that, as the stock, having been delivered in good condition is presumed so to continue until the contrary appears (*Powers v. Ry.*, 130 Iowa, 615), and if in bad condition, upon reaching its destination, this, as it has been in the exclusive control of the carrier, is presumed to have resulted from some negligence on its part. In other words, from a showing of having been delivered to the carrier in good condition and received by the shipper at its destination in bad condition, the inference arises that the company has been negligent in the performance of its duties as a common carrier in the transportation of the stock."

Allegations of these facts contained in the petition as seen were held in *Swiney v. Express Co.*, *supra*, sufficient to charge negligence to the carrier, and, as no more need have been proven to entitle plaintiffs to the relief prayed, the court rightly ruled in submitting the cause to the jury, even though the action be deemed one sounding in tort. This conclusion is not obviated by the allegations with reference to the rough handling of the car at Blue Island. Section 3614 of the Code declares that place need only be alleged when it forms a part of the substance of the issue. Here the reference to a particular place was not essential, the allegations being sufficient to admit the same proof had this been omitted, and covering the entire line from Chicago

3. SAME: action
for negli-
gence: proof.

to Perlee. The presumption of negligence arising from the evidence adduced was as applicable to the car at Blue Island as at any other point along the road. In other words, plaintiffs' proof of injury to the stock while in defendant's exclusive possession covered all points, Blue Island as well as every other place along defendant's road, and a court would not be justified in saying that there was no proof of negligence at the particular point charged by plaintiffs, even if the action were solely bottomed on negligence.

Our conclusion, then, is that the district court did not err in submitting the case to the jury on the theory that plaintiff had made out a *prima facie* case against defendant, and that, though the evidence concerning the condition of the car might have been deferred until defendant had undertaken to meet such *prima facie* case by showing circumstances which might relieve it from liability, it was not error to receive it as a part of the evidence in chief.

II. One of the plaintiffs, John Gilbert as witness, after testifying that his business was handling stock, was asked, "What was the difference in the actual or market value of these cattle in the condition in which they were received there at Perlee, when you first saw them, and what their value would have been if they had been delivered in good condition?" An objection that this called for an opinion as to the very issue the jury were to decide was overruled. Probably the better practice is to elicit an estimate of the market value before and immediately after injury, allowing the jury to ascertain the difference. But, where the difference between such values is simply a matter of easy computation, it is not reversible error to permit the witness to state such difference instead. *Parrott v. Railway*, 127 Iowa, 419; *Missouri Pacific Ry. Co. v. Harmonson* (Tex. App.) 16 S. W. 539; *Laird v. Snyder*, 59 Mich. 404 (26 N. W. 654, 17 Cyc. 53).

III. Another of plaintiffs, Samuel Gilbert, after qualifying, was asked how much the steers had gained from the time of purchasing them in September, 1908, until January, 1910, when sold. Objection as not calling for the best evidence was interposed, it having appeared that the animals were weighed by some one at the stockyards, both when bought and when sold, and a record thereof kept. The objection was rightly overruled. But for the cattle having been weighed the testimony was admissible. *Westphalen v. Railway*, 152 Iowa, 232; *Ft. Worth & D. C. Ry. v. Great House*, 82 Tex. 104 (17 S. W. 834). And no showing whatever was made which would have justified the admission of the record. *Cummings v. Insurance Co.*, 153 Iowa, 579.

Nor was there any proof that the scales had been properly balanced, or that the party weighing them had done so accurately. In other words, there was no showing that evidence of weights was of better quality than estimates of experienced stockmen, and there was no error in the court's ruling.

The record is without error, and the judgment is—
Affirmed.

ELDA LUCILE WARDMAN, Minor, by RUTHANNA WARDMAN, her Guardian, Appellant, v. ROBERT HARPER.

Conveyances: REVOCATION: SUBSTITUTION. The parties to an unrecorded deed may revoke the same and substitute another by parol agreement; and it is immaterial whether the original was destroyed or delivered back to the grantor. Evidence held to show that by agreement the former deed reserving a life estate was revoked and a new deed executed and delivered in its stead, reserving a fee title to the land under which plaintiff in this action claims title.

Appeal from Marshall District Court.—HON. C. B. BRADSHAW, JUDGE.

TUESDAY, JUNE 25, 1912.

The facts are stated in the opinion.—*Reversed.*

Carney & Carney, for appellant.

C. H. Van Law, for appellee.

SHERWIN, J.—Robert Tannahill and Isabella Harper were brother and sister. In 1888, and for several years prior thereto, Mrs. Harper was her brother's housekeeper on his farm of about 250 acres. In May, 1888, Robert Tannahill conveyed the farm, on which he and his sister, Mrs. Harper, were living, to her, reserving to himself a life estate in the entire land conveyed. The consideration named in this deed was love and affection and \$2. The deed was not recorded until after the death of both Tannahill and Mrs. Harper, more than twenty years after it was made. On the 11th day of November, 1889, Robert Tannahill made another deed conveying the same land, with the exception of about five acres thereof, to Mrs. Harper, and this deed was delivered to her and recorded on the day of its execution, the 11th of November, 1889. The land is described in the last deed exactly as it is in the first one, and, deeming the description thereof and the language of the reservation in the last deed material, we here set out that part of the deed. It is as follows:

The south half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) and the north half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) and the northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) and the south half ($\frac{1}{2}$) of the southwest quarter of the northeast quarter ($\frac{1}{4}$) and all that part of the northwest quarter of the northwest quarter, south of the highway running through said forty-acre tract, all in section No. thirteen (13) in township No. eighty-four (84), north, range No. nineteen (19), west of the 5th P. M., Iowa, ex-

cepting the following described land which is reserved to the grantor herein, viz.: All that part of the south half of the southwest quarter of the northeast quarter of said section thirteen (13) township and range aforesaid, lying east of the road running through said twenty-acre tract, being about five acres of land, more or less.

The consideration named in the deed of November, 1889, is \$10,000. Mrs. Harper took possession of the land conveyed to her, and Robert Tannahill retained possession of the land reserved in the last deed, and both continued in possession until their deaths; the death of Robert Tannahill occurring in August, 1908, and the death of Mrs. Harper in April following. Tannahill left a will by which he gave the plaintiff what is known in the record as lot No. 2 in the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 13; it being, as we understand the record, the tract of about five acres that was reserved in the deed of November, 1889. His will was duly probated, and thereafter this suit was brought to determine the title to this five acres; the plaintiff claiming that it belongs to her under the will of Robert Tannahill, and the defendant claiming that the deed of May, 1888, conveyed the same to his mother, Isabella Harper, subject only to the life estate of grantor, and that the purpose and effect of the deed of November, 1889, was only to convey Robert Tannahill's life estate in the rest of the land. There was a judgment for the defendant, and the plaintiff appeals. The controlling question for determination is whether the deed of May, 1888, remained in force after the execution of the deed November, 1889. If it did, Robert Tannahill had only a life estate in the land in controversy here, because the deed of May, 1888 conveyed this land with the remainder of the farm, reserving a life estate only.

That it was competent for the parties to revoke and cancel the first deed by parol agreement, and to substitute another therefor, can hardly be questioned. *Blaney v.*

Hanks, 14 Iowa, 400; *Matheson v. Matheson*, 139 Iowa, 511; *Albrecht v. Albrecht*, 121 Iowa, 521;
I. CONVEYANCES:
revocation:
substitution. *Grapes v. Grapes*, 106 Iowa, 316; *Brown v. Brown*, 142 Iowa, 125.

And if such an agreement and substitution was, in fact, made, it can make no difference whether the original deed was destroyed or delivered back to the grantor. A failure to destroy, or deliver back, would be evidence bearing upon the actual contract and intent of the parties, but nothing more. The first deed was unrecorded, and a reconveyance was therefore not necessary to keep the record title straight.

The evidence fully satisfies us that the deed of November, 1889, was executed by Tannahill and accepted by Mrs. Harper in place of the deed of May, 1888, and that it was their mutual agreement and intent that the prior deed should be of no further force or effect. The second deed made no reference to the first. The exception and reservation were of an absolute fee, and not of a life estate only. The evidence shows that, when the second deed was executed, the scrivener who made it had before him the first deed, and took the description of the entire farm therefrom, and it is apparent that he thought it easier to make the reservation of the five acres in the form he did than to undertake a description of the farm with the five acres excluded therefrom. It is also significant that the fee was reserved in this deed, when the former deed reserved in terms a life estate. If it had been intended to reserve a life estate only in the five acres in the second deed, it would undoubtedly have been so declared. Another circumstance is that the second deed in express language conveys the whole estate in the land, except the five acres reserved, while, if it was the intention of the parties that it should convey only the life estate that had been reserved in the former deed, it would have been a simple matter to have said so in language that could not be

misunderstood. The declarations of both parties after the execution of the second deed clearly show that they understood that the first deed was no longer of force, and that the tract reserved to Tannahill in the second deed was held by him in fee. That he so understood the transaction is further evidenced by his act in giving it to plaintiff by his will. Still another fact worthy of note is that the second deed was duly recorded on the day that it was executed, while the first deed was not recorded until after the death of both grantor and grantee, and was then found and recorded by this defendant. It is true, the evidence tends to show that the first deed remained in possession of Mrs. Harper until her death; but it is a circumstance of slight value when considered with the other evidence in the case and in connection with the fact that the parties to the transaction were brother and sister.

We reach the conclusion that the plaintiff is entitled to lot 2 under the will of Richard Tannahill, and the judgment of the district court is therefore—*Reversed*.

CORNELIUS MARNAN as Administrator of the Estate of
HARTWIG STENDER, deceased, Appellee, v. THE CHICAGO,
ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellant.

Railroads: CROSSING ACCIDENT: CONTRIBUTORY NEGLIGENCE. One is not necessarily guilty of contributory negligence on approaching a railway crossing in a city by failing to stop, look and listen for an approaching train. In the instant case there was evidence tending to show that no proper signal or warning of the approach of the train was given; that the flagman was not at his place of duty; that the train was being operated at an unlawful rate of speed, and that the view of an approaching train was somewhat obstructed, and it is held that the question of contributory negligence was for the jury.

Same. Where a railway crossing gate is open and the flagman gives

2 no warning there is some assurance at least that the crossing can be made in safety; and such facts have a direct bearing on the question of whether the traveler who acted upon it exercised reasonable care.

Same: EVIDENCE: CONCLUSION. The statement of a witness who
3 saw deceased approaching the crossing that "I thought he was going to stop," was properly stricken as the conclusion of the witness.

Same: NEGLIGENCE: EVIDENCE. The evidence as to whether the
4 flagman swung his lantern as a signal of the approaching train was in such conflict as to require submission with the other issuable facts.

Verdict: PASSION AND PREJUDICE. The verdict of \$3,475.67 for the
5 death of decedent, a man of sixty years of age, was not so large as to clearly indicate passion and prejudice.

Appeal from Scott District Court.—HON. JAS. W. BOL-
LINGER, JUDGE.

WEDNESDAY, JUNE 26, 1912.

ACTION at law to recover damages for the death of the plaintiff's intestate. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Carroll Wright and J. L. Parrish, and Cook & Balluff,
for appellant.

M. V. Gannon and W. M. Chamberlin, for appellee.

WEAVER, J.—While in the act of walking across the defendant's track at a public crossing in the city of Davenport, Hartwig Stender was struck and killed by a moving train. This collision, the plaintiff, who is administrator of Stender's estate, avers was caused by the negligence of the defendant in operating its train at a high rate of speed in violation of an existing city ordinance, in failing to sound proper signals, or give proper warnings of the train's

approach, and in failing to maintain proper gates or guards at the crossing. The deceased was a man of about sixty years of age and familiar with the crossing. The accident occurred about half past seven on the evening of January 22, 1909. The night was quite dark, and there was some wind and rain. The defendant had provided gates for this crossing, but at the time in question they were not being used. A flagman was also kept stationed there, but his position at the moment of the accident, and whether he was at his proper place and attending to his duties, is a matter of some uncertainty. By ordinance of the city the maximum rate of speed permitted to trains operated over and across the public streets was twelve miles per hour. Defendant's track runs east and west along the course of Fifth street; and across Warren street, which is eighty feet in width and extends north and south. East of the east line of Warren about eleven feet stands a small cabin or shanty for the flagman. Stender was seen walking south on the west side of Warren. After he had left the north curb of Fifth street, and as he neared the track, he appeared to look up, and, immediately quickening his movement, he had advanced to a point at or near the south rail when he was struck. The evidence fairly tends to show that the train was moving at considerably more than twelve miles per hour; some witnesses estimating it as high as twenty-five miles.

The flagman's testimony as to his own position at the time was not obtained. One witness thinks he saw him swinging his lantern at the middle of the crossing, but another swears that he himself was at that moment talking with him on the east side of Warren street, and that the flagman was facing to the east. The engineer in charge of the train says that, when east of the flagman's cabin from ten to twenty-five feet, he saw the deceased, and hesitated an instant about checking the speed, thinking the traveler would not walk into a collision, but almost immediately,

seeing the imminent danger, he sounded the whistle and attempted to stop, but was unable to do so in time to prevent the accident. He says that his train was not a heavy one, and if moving at fifteen miles an hour he thinks he could have brought it to a stop in from sixty to seventy feet; and that if moving at twenty miles an hour the stop might in his judgment be accomplished in eighty-five or ninety feet.

There was testimony also, though disputed, that the engine was being operated without signals by bell or whistle until immediately before the deceased was struck. It carried a headlight illuminating the track to a distance of a thousand feet or more. No one was walking with deceased, but several persons were within seeing distance. He appears to have entered upon the street crossing and failed to note the dangerous proximity of the train until very close to the instant of collision. If he stopped at any place to look or listen, no one observed the act. We find no evidence that any one saw him before he left the curb, and no witness is able to say whether he did or did not look to the east for approaching trains before he entered upon the crossing of Warren street. Defendant admits that on the evidence offered the jury could properly find there was negligence in the speed of the train. It also concedes that the question whether proper signals were given is a matter upon which there is a conflict of evidence; but counsel argue that, even if such negligence be found, it was not the proximate cause of the collision, but that such cause is to be found in the negligent act of the deceased himself in recklessly walking into danger.

Stated in other words, the chief contention on behalf of appellant is that deceased was chargeable with contributory negligence as a matter of law. The rule which makes a party negligently injured bear all the loss suffered by him, if as a matter of fact he is chargeable with any part of the blame, is, of course, too well settled in the law

of this state to be open to discussion. Nor can there be any doubt of the soundness of the appellant's proposition that he who enters a known place of danger must make reasonable use of his senses to avoid harm. He can not recklessly close his eyes and ears to the plain evidences of impending peril and be entitled to damages for an injury which, in the exercise of reasonable care, he would have escaped. The rule is plain enough, but its application is by no means always self-evident. The inquiry whether a given act is reckless, imprudent or careless, or is reconcilable with that degree of care which men of ordinary prudence observe under like or similar circumstances, depends generally upon many considerations. It is a matter of deduction, argument, and reasoning from a more or less intricate network of facts and, as such, falls within the province of the jury and not of the courts.

A collision with a railway train upon a highway crossing on the open prairie, where no watch or guard is kept or can reasonably be expected, and where a person approaching on the highway has an unobstructed view of the track for a long distance, is one thing. A collision upon the street of a crowded city, where speed of trains is regulated by law or ordinance, where gates and flagmen are a reasonably necessary provision for public safety, where the highway is used by hundreds if not thousands of people every day, and where an open view of the track for any considerable distance is not ordinarily obtainable until the traveler is within or very near the zone of danger, is quite another thing. In the former case one can hardly conceive how a person using the highway and being in full possession of his physical and mental powers can be injured by a passing train without the most obvious negligence on his part. In the latter case it is by no means difficult to understand how sometimes a traveler of experience and intelligence may be run down and injured without being con-

1. RAILROADS:
crossing acci-
dent: contrib-
utory negli-
gence.

clusively chargeable with want of reasonable care for his own safety. Each city street is a place of danger. In every passing carriage or street car, in every defect in a side walk or crossing, in every pole and wire overhanging cornice or window cap, in every railway crossing, and in numberless other things, there are ever present threats of possible injury, yet no one would think of saying that the citizen must keep indoors at the peril of being held negligent if he assumes to use the public way. Along the walks and roadways there flows a ceaseless current of humanity, and, if each individual must stop at each crossing and wait till all possible danger has demonstrably disappeared, that current will be effectually checked, and business and social stagnation follow. Crossings afford a common way for the use of the ordinary traveler on the one hand, and of the railway on the other, and each is bound to exercise that right with due regard to the rights of the other. The highway traveler yields precedence to the railway train; but, when the crossing is clear, he is under no obligations to stop and wait unless there be a train approaching and within such distance as to indicate to his mind as a reasonable man that he can not make the passage without danger of injury. While nothing will excuse him for failing to see or hear what as an ordinarily prudent man under all circumstances he ought to see and hear, he is not necessarily chargeable with negligence as a matter of law if he places some degree of reliance upon the regulations, guards and warnings which the law or custom has provided for protection of the public of which he is a part. He may rightfully assume that a train in the distance is not approaching him at an unlawful rate of speed. *Powers v. Railroad Co.*, 143 Iowa, 432.

If a crossing gate be opened, and the flagman gives no warning, such fact has in it some of the elements of invitation on the part of the railway company, or at least partakes of the nature of an assurance of safety on its

part, and as such has a direct bearing on the question whether the traveler who acts upon it exer-

2. SAME.

cises reasonable care. *Doyle v. Railroad Co.*, 145 Mass. 386 (14 N. E. 461); *Palmer v. Railroad Co.*, 112 N. Y. 241 (19 N. E. 678); *French v. Railroad Co.*, 116 Mass. 537; *Sonier v. Railroad Co.*, 141 Mass. 10 (6 N. E. 84); *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305 (20 N. E. 843, 10 Am. St. Rep. 136); *Sweeney v. Railroad Co.*, 92 Mass. 368 (87 Am. Dec. 644); *Railroad Co. v. Clough*, 134 Ill. 586 (25 N. E. 664, 29 N. E. 184); *Railroad Co. v. Schneider*, 45 Ohio St. 678 (17 N. E. 321); *Railroad Co. v. Coon*, 111 Pa. 430 (3 Atl. 234).

Indeed, giving effect to the law of the cases here cited, and of numerous other precedents to the same point, every fact contended for by the appellant as to the conduct of the deceased may be conceded without making the case one for a directed verdict on the ground of contributory negligence. It stands conceded that there was evidence of neglect in the matter of the speed of the train and of the omission of the statutory signals. It is also conceded that the gates were not in use, and that a flagman had been provided. There is also conflict in the evidence as to whether the flagman was giving attention to his duty as the train approached.

In the *French* case, *supra*, where a person relying upon the absence of signals undertook to make the crossing without looking for the train at a place where she might have seen it, it was held that the question of contributory negligence was for the jury. A similar rule was applied by the Ohio court in the *Schneider* case, above cited. In *Railroad Co. v. Stegemeier*, *supra*, it was held by the Indiana court that an open gate and absence of a flagman constituted such an affirmative assurance of safety that a traveler could not be charged with negligence as a matter of law because he undertook to make the crossing without

taking the precautions usually required of one about to enter upon a railway track. This we think is the rule of reason as well as of law. If the public may not assume that the laws and ordinances enacted for its protection will be observed and that open gates and an absent or inactive flagman is an indication of safety to the traveler about to cross the track, then all devices will operate less as safeguards to the traveler than as traps by which he will be lured to his destruction.

There is no evidence in the record tending to show that deceased did not look for trains before leaving the Fifth street curb. Whether there be any presumption that he did so we need not consider. To say the least, there is no presumption that he did not look. If he did look, and saw or ought to have seen the train, he was not necessarily negligent in attempting to cross; for, under the evidence as to its speed, it must have then been at such distance that, had the ordinance of the city been observed, he would have cleared the track in ample time to avoid the collision. There is no proof that he knew or could readily have noted the speed of the train's approach, and, as we have already said, he could rightfully assume that it was not excessive. Even as it was, he was within a single step or two of safety when struck, and the evidence clearly justifies a finding that, had the train been moving within the ordinance limit, he had abundant time to cross. Under essentially similar circumstances, we have held that a traveler thus injured is not guilty of contributory negligence as a matter of law. *Powers v. Railroad Co.*, 143 Iowa, 432.

There was no error, then, in the refusal of the trial court to set aside the verdict on that ground.

The court instructed the jury with reference to the so-called doctrine of the "last fair chance." The contention for appellant in this respect is that there was no evidence on which such an instruction could properly be pred-

icated. The members of the court are equally divided as to whether it was error to submit the question to the jury under the record.

A witness, having testified that he saw deceased walking from the curb toward the track, added, "I thought he was going to stop," and the statement was stricken out on plaintiff's objection. Error is also assigned on this ruling. While the answer might well have been permitted to stand, we think the ruling was not erroneous. The witness does not say that he drew the inference of which he speaks from anything in the appearance, attitude, or movement of the deceased, or state any fact to indicate that this expression, "I thought he was going to stop," refers to anything else than his own mental process. Had he said that "Stender acted as if about to stop," or that "he hesitated and looked around as if about to stop," or other words of similar import, it would come much nearer to admissibility under the rule rendering competent testimony which partakes of conclusion with reference to the personal appearance of one whose conduct is under inquiry. But the witness does not say this or its equivalent, nor was he further interrogated to bring out an explanation of his statement. The exception taken can not be sustained.

The court, in stating the negligence charged in the petition, recited the allegation to the effect that the flagman negligently failed to swing his lantern in warning of the approach of the train. This is said to be erroneous because it was shown without dispute that the flagman was in his proper place and did swing his lantern. The record is not so clear in this respect as argued by counsel. As we have already said, one witness does testify that the flagman was in the middle of the street swinging his lantern; but another, who says he was talking with the flagman at that moment, locates him on the east side of the street facing

3. SAME:
evidence
conclusion.

4. SAME:
negligence:
evidence.

east. While this witness says he does not know whether the flagman was swinging his lantern, he adds that he did not see him do it. No other witness testifies on the subject. The record, we think, leaves the situation upon this feature of the case in sufficient uncertainty to justify the court in leaving it with other issuable facts for the consideration of the jury.

It is finally argued that the verdict of \$3,475.67 is excessive. We think the recovery is not so large as to clearly indicate passion and prejudice on the part of the jury, and we are not at liberty to interfere with it.

There is no error in the record requiring a new trial, and the judgment of the district court is—*Affirmed*.

S. H. KLOPP, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

Railroads: CROSSINGS: *Mandamus*: TRIAL BY COURT. *Mandamus* is the proper action to compel a railway company to construct a crossing for the accommodation of a landowner, and under the statute must be tried to the court whether of a legal or equitable nature; and a trial to a jury over objection is reversible error.

Same: TRANSFER TO EQUITY: STATUTES. The provisions of the statute relating to transfer of causes without abatement or dismissal, when an error in the kind of proceeding has been adopted, are not applicable to an action in *mandamus*; and if designated in the petition as a law action that fact would not require the defendant to move for a transfer to the equity side of the docket and to object to a jury trial before answering, for the court has no authority to submit the action in any form to a jury.

Same: REVERSAL. Where an action in *mandamus* has been erroneously tried to a jury it will be reversed that it may be tried to the court as provided by statute.

Appeal from Linn District Court.—HON. MILO P. SMITH,
JUDGE.

WEDNESDAY, JUNE 26, 1912.

ACTION of mandamus wherein plaintiff, an owner of property on either side of defendant's line of railway seeks to compel defendant to construct an underground crossing on its roadbed for use in connection with plaintiff's premises; and for judgment for \$500 damages for failure to maintain an adequate crossing from August 1, 1906, down to the date of the institution of the action. Over defendant's protest and exceptions the case was tried to a jury, resulting in a verdict for plaintiff, and a finding that he was entitled to an underground crossing at or near the point asked for by him, and that he had sustained damages in the sum of one dollar. The jury also returned an answer to a special interrogatory as follows: "Under all the facts and circumstances given in evidence which crossing do you find is the more reasonably adequate, the crossing which the plaintiff has requested, or the present one? Answer: The one requested." Judgment having been rendered on this verdict, the defendant appeals.—*Reversed and remanded.*

Cook, Hughes & Sutherland, for appellant.

Rickel & Dennis, for appellee.

DEEMER, J.—The petition filed by plaintiff was denominated a petition at law, but was really an action of mandamus to require the defendant to construct an underground crossing, connecting his lands on either side of the defendant's right of way, and asking a judgment for damages. In due season defendant filed an answer to this petition. Thereafter the defendant was given leave to

withdraw its answer, and to file a motion to transfer the cause to the equity side of the docket. This motion was overruled by the court on the 12th day of November, 1910; the defendant preserving its exception. Thereupon the defendant filed an answer, setting forth various defenses, and, after filing its second answer, the defendant filed its second motion to transfer the case to the equity side of the docket. This last motion was overruled by the court on the 14th day of November, 1910. The case was assigned for trial and came on for hearing on the 14th day of November. When the case was reached, the defendant made the following objection: "The defendant objects to the calling, swearing, or impaneling of a jury in this cause, and objects to the cause being tried before a jury, because section 4341 of the Code Supplement of 1907 provides that all such cases shall be tried as equitable actions, and the court has no right, authority, or jurisdiction to try the same before a jury." This objection was overruled, a jury was impaneled, and the case proceeded to trial to a jury. At the conclusion of plaintiff's evidence defendant moved for a directed verdict, which motion was overruled, and the defendant excepted. At the conclusion of all the evidence, the defendant renewed its motion for a directed verdict, which motion was overruled and exception again taken. The jury was then instructed and returned a verdict with the answer to the special interrogatory heretofore set out. Defendant excepted to the verdict, and thereupon filed a motion for decree and judgment denying the writ of mandamus. This motion was based upon the defenses pleaded in defendant's answer, and raised practically all the questions which it relied upon as a defense to plaintiff's suit. This motion was overruled, and a judgment and order for writ of mandamus granted as prayed.

I. The appeal challenges many of the rulings and orders of the trial court. The only one which we need now consider is the trial of the case to a jury over the

defendant's objections, which were interposed at the time the jury was called; and perhaps the ruling on the first motion made by the defendant to transfer the cause to the equity docket.

1. RAILROADS:
crossings:
mandamus:
trial by court.

The statute with reference to actions of mandamus in force when this action was tried reads as follows: "The action of mandamus is one brought to obtain an order commanding . . . a corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. . . . All such actions shall be tried as equitable actions." Code Supplement, section 4341. That the action was of mandamus, and was properly brought as such, is practically conceded. Indeed, such is the holding in *Boggs v. Railway*, 54 Iowa, 435. Whether it be proper to entitle it in the petition as an action at law or in equity is not, as we think, material. Until the change in the statute, it was generally recognized as a special proceeding, or an action at law and triable to a jury, but the statute now says that "all such actions (no matter whether at law or in equity) shall be tried as equitable actions." Section 3650 of the Code provides that: "Issues of fact in an ordinary action must be tried by jury, unless the same is waived. All other actions shall be tried by the court, unless a reference thereof is made." This section has not been regarded as applicable to what are now denominated in the Code (section 3425) as special actions. See *In re Bresee*, 82 Iowa, 573; *Porter v. Butterfield*, 116 Iowa, 729; *Green v. Smith*, 111 Iowa, 185; *Frank v. Hollands*, 81 Iowa, 166; *In re Culver's Estate* 153 Iowa, 461. As the statute expressly provides that the action shall be tried as an equitable one, the court had no right or authority, over defendant's objections, to order the case tried to a jury; and was not justified in shifting the responsibility to such a tribunal. The parties were entitled to the personal judgment and decision of the court, and

the designation of the petition as one at law, instead of a petition in equity, did not warrant the court in refusing to try the issues, where the request was made before the trial was actually begun. This question is settled, as we think, in *Hobart v. Hobart*, 51 Iowa, 513. This, it is true, was a divorce suit, which, over the objection of the defendant, the court referred to a jury, received the jury's verdict, and entered a decree in accord with the verdict so returned. The question arose upon appeal as to the validity of such a verdict, and in the course of the opinion the court said:

Section 2998 of the Revision provides: 'Issues of law must be tried by the court unless referred as provided in section 3089. An issue of fact in an action by ordinary proceedings must be tried by a jury, unless a jury trial shall be waived, as provided in section 3087, or a reference be ordered as provided in section 3090.' Section 2740 of the Code of 1873, which is a substitute for section 2998 of the Revision, is as follows: 'Issues of fact, in an action of ordinary proceeding, must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is made.' Sections 2741 and 2742 of the Code, which are substituted for section 2999 of the Revision, do not contain the provision respecting the submission of a question of fact to a jury to inform the conscience of the court. This omission is very significant, and sufficient of itself to raise a strong presumption of an intention to change the practice in such cases. But, in addition to this omission, section 2740 of the Code affirmatively provides for the manner in which issues of fact shall be tried. This section declares that all issues, other than issues of fact in an action in an ordinary proceeding, shall be tried by the court, unless a reference thereof is made. This provision, it seems to us, places it beyond question that an issue of fact, in an equitable proceeding can not be submitted to a jury. Appellee insists that the exception in section 2740, allowing a reference, authorizes a reference of a question of fact to a jury. But this construction is not admissible. A reference of issues of fact in actions is provided for in sections 2815-2830

of the Code. It is to such a reference that section 2740 refers. It is true that in *Sherwood v. Sherwood*, 44 Iowa, 192, this court said: 'It would have been competent for the court to have had the issue respecting the alleged adultery tried by a jury in order to advise the conscience of the court, and this in analogy to the English chancery practice.' But this point was not in that case, inasmuch as a jury trial was demanded and was refused. Besides, the attention of the court was not directed to the change in the law as to the mode of trial. The same is true as to the *Howe Machine Co. v. Woolly*, 50 Iowa, 549. A trial by jury was also denied in that case. What was said is a mere repetition of the dictum in the case of *Sherwood v. Sherwood*, *supra*. Section 2511 of the Code provides that an action for divorce shall be prosecuted by equitable proceedings. Upon the former appeal of this case it was held that the adoption by the court, upon an examination of the evidence, of the findings of the referee, does not remove the prejudice which may have resulted from the reference. The same is true as to the adoption by the court of the findings of the jury.

The applicability of this decision to the instant case is apparent when we turn to the statute, under which that decision was made, with reference to the trial of divorce suits. It was 2511 of the Code of 1873, which is now 3430 of the present Code, and reads as follows: "An action for a divorce shall be by equitable proceedings." The one objection interposed in the *Hobart* case was to the trial of the case to a jury because the law required such cases to be tried by the judge. This objection was overruled, and the case proceeded to trial to a jury, as already indicated. The case was reversed simply because of the error in submitting it to a jury.

Appellee attempts to meet this by referring to the well-known rule, applied to proper cases, to the effect that an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings

and a transfer to the proper docket, and that an error as to the kind of proceedings adopted in the action

2. SAME: transfer to equity: statutes. is waived by a failure to move for its correction at the time and in the manner prescribed in the Code. This procedure is as follows: "Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards on motion in court." (Code, section 3433.) "The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provision of this Code wrong proceedings have been adopted." Code, section 3434.) We do not think these sections are applicable to the case. There was no error in the kind of proceedings adopted. The action was rightly in mandamus, and the sole question for determination was how should such an action be tried, whether to the court or by jury. That question would not arise properly until the case was called for trial. But, if we should hold these sections applicable, the same conclusion would result; for the reason that, while defendant did not file its first motion to transfer at the time of or before the filing of its first answer, it had permission of the court to withdraw this answer, and then filed its motion to transfer. Even if such a motion were necessary, we think the court was in error in denying the first motion to transfer. But the fact is there was no error as to the kind of proceedings adopted. The statute expressly says that the action of mandamus shall be tried as an equitable one, and the court had no power, in view of defendant's objections, to order the issues submitted to a jury, and then to adopt the findings of the jury as basis of its judgment and decree. This it seems to us is so plain that argument can add little.

II. For the error pointed out, the case must be reversed, and the only remaining question is, What shall be done with it? The trial court has never, as yet, passed

upon the matter, save as it adopted the conclusion of the jury. The parties are entitled to his independent judgment, and until that is had this court should not interfere. We may say however, that under the record as it now appears, especially in view of the verdict of the jury, it is very doubtful whether plaintiff is entitled to the relief demanded. Under the facts as we understand them, and, of course, they may not be the same upon a retrial, we would be disposed to find that the plaintiff was not entitled to a writ compelling the underground crossing which he seeks to have established.

We, therefore, reverse the case that the same may be tried by the court as the Code provides, with permission, of course, to either party to introduce such testimony as it may have to offer. For the reasons already stated, the judgment must be, and it is, reversed, and the cause remanded for further proceedings in harmony with this opinion.—*Reversed and remanded.*

J. C. SAVAGE, et al., v. L. E. ARMSTRONG, et al., Appellants.

Boundaries: ACQUIESCENCE: EVIDENCE. Where a boundary fence has
1 been recognized and acquiesced in by adjoining landowners for a long series of years as marking the true boundary line between their lands, and their occupancy has been apparently with reference to such fence, the presumption arising from such acquiescence is sufficient to determine the location of the line, unless there are controlling circumstances such as will overcome the presumption. In the instant case the evidence is held to show an established line by acquiescence.

Same: ESTOPPEL. It is also held that the conduct of the plaintiffs
2 was such as to estop them from contending that the line thus acquiesced in is not the true boundary.

Appeal from Webster District Court.—HON. C. G. LEE,
JUDGE.

SATURDAY, SEPTEMBER 2, 1912.

ACTION for an injunction restraining defendants from trespassing on plaintiffs' land by erecting a fence thereon, and requiring that defendants remove from said land any fencing material which may have been placed thereon by them. There was a decree for plaintiffs, and the defendants appeal.—*Affirmed.*

A. N. Botsford and Price & Joyce, for appellants.

E. H. Johnson, for appellees.

McCLAIN, C. J.—This controversy relates to a boundary line running east and west between the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 2 and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 3, all in township 88, range 29, in Webster county, on the south, and a tract of land belonging to defendant Armstrong and others on the north. The details of ownership and source of title to these three tracts need not be fully set out, in order to enable us to determine the questions presented on this appeal. It is sufficient to say that the plaintiff J. C. Savage is the owner in his own right of the west eighty above described, having acquired title thereto through his mother in 1903. She had bought it from one Mooney in 1899 and Mooney had been the owner for many years prior to that date. The plaintiffs, including J. C. Savage, are the owners in common of the east eighty above described, which was purchased by Michael Savage, father of J. C. Savage, in 1878, and has been occupied by him, and after his death by his widow, Jane Savage, and certain of his heirs, brothers of J. C. Savage, until the present time. The controversy between these plaintiffs and the defendant, who own or have interests in the tract of land adjoining the two eightys on the north, arose in the fall of 1910, when the defendants,

through their agents and employees, attempted to erect a new fence on a line somewhat south of the line of an old fence, which had for many years been maintained by plaintiffs and their grantors and the owners of the land to the north of them. Plaintiffs do not ask that their title be quieted to the strip between the two fences, but they seek an injunction to restrain defendants from erecting and maintaining a new fence, and they also ask that the new fence, as partially constructed, and the material to be employed in its construction, be removed from their land. The effect of the decree of the lower court is, however, to establish the true boundary line, and no doubt is as effectual in determining the title of plaintiffs to the strip of land between the old fence and the new fence as though a decree quieting title in plaintiffs to such strip had been expressly asked. In this respect there is no complaint as to the form of the decree. It is conceded that there is a misjoinder of plaintiffs, inasmuch as there is no common ownership of plaintiffs in the west eighty, on the one hand, which belongs exclusively to plaintiff J. C. Savage, and the east eighty, which belongs exclusively to Jane Savage and other plaintiffs, as widow and heirs of Michael Savage; but, although the question of misjoinder was properly raised by defendants, it has been agreed that the cause shall be determined without regard to such misjoinder. The sole question presented is whether the lower court erred in granting the relief prayed by all the plaintiffs as against the defendants.

It is the contention of the plaintiffs that, without regard to the exact location of the boundary line according to the government survey between their two eighties and the land of defendants lying to the north of them, a boundary line has been established by the joint maintenance and repair of a fence, which has existed for more than twenty years, between the properties, and that this fence has, by ac-

1. BOUNDARIES: .
acquiescence:
evidence.

quiescence, become the true boundary line. Without setting out the evidence in detail, we are satisfied to sustain the conclusion, announced by the lower court, that this fence had been acquiesced in as marking the boundary line for such length of time as that it must be treated as constituting the true boundary line by an implied agreement, unless, for reasons hereafter to be referred to, the plaintiffs are now estopped from insisting that it shall be so treated. The proof of acquiescence for many years, based upon the maintenance and repair of this fence and occupancy of the land to the line thus indicated, is overwhelming. It is true that there seems to have been a controversy between the owners of the land lying east of the east eighty and the owners of the land adjoining it on the north as to whether the fence between them, which was a continuation of the old fence between the lands of the parties to this suit, was on the true line, and that the portion of the fence to the east on the east eighty has been so changed as to create a jog. But we regard this fact to be in itself wholly immaterial. No concessions between other parties as to the continuance of the old fence to the east could affect these plaintiffs. There is testimony as to certain conversations between Michael Savage, then owning the east eighty, and those interested in the location of the fence to the east of his land, tending to indicate an uncertainty on the part of Michael Savage as to whether the old fence was the true line; and there is similar evidence tending to show an uncertainty on the part of Mooney, who owned the west eighty, as to whether the fence as it existed north of his eighty was on the true line. But this evidence falls short of establishing any intention on the part of Michael Savage and Mooney to abandon the claim, which must be implied from the maintenance of the fence for a long time and the occupancy of the land up to the fence as the true boundary, that such fence was the real boundary between their respective eighties and the land to the north; for no

question seems to have been entertained at any time between either Mooney or Michael Savage, on the one hand, and the owners of the land, on the other, as to the fact that this fence was on the true line.

It is true, as contended for appellants, that the inference arising from ten years' acquiescence in a boundary fence and occupancy with reference to such fence as the true line may be overcome by proof of other controlling circumstances inconsistent with and contradicting the inference of acquiescence. *Miller v. Mills County*, 111 Iowa, 654. But, if there are no controlling circumstances sufficient to overcome the inference from acquiescence—that is, if it does not appear that the fence maintained by the parties was so maintained with the understanding that it did not constitute the true boundary line, and occupancy has been apparently with reference to such fence as the boundary line—then the presumption from acquiescence is sufficient to determine the boundary line in controversy. *Keller v. Harrison*, 139 Iowa, 383. As we find no controlling circumstances such as to overcome the presumption from long acquiescence, we are satisfied that prior to the origin of this controversy the old fence had become established as the true boundary line. The evidence does not support the contention of appellants that the old fence was a mere tentative affair and the case of *Webster v. Shrine Temple Co.*, 141 Iowa, 325, is not in point.

Counsel for appellants contend, however, that, irrespective of the question of acquiescence, the record shows that the plaintiffs are estopped by their conduct from now claiming that the new fence, partially constructed by appellants, and which they are by the decree enjoined from completing or maintaining, is not on the true line. This contention is based upon the alleged conduct of plaintiff J. C. Savage, owner of the west eighty in his own right and owner in common with his mother and his brothers and sisters of the east eighty. The

2. SAME:
estoppel.

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estoppel.

facts on which this contention is predicated may be briefly stated as follows: On August 12, 1910, one Lind, a surveyor in the employ of defendants, undertook to run a line from the river, situated some distance east, to the highway west of defendants' land, which should determine the true line according to the government survey between the tract of land lying east of plaintiffs' east eighty and the land of defendants lying north of it, and by continuation westward also the true line between the plaintiffs' land and the defendants' land; and it is contended for appellants that Lind then advised J. C. Savage that this survey was being made for the purpose of locating the line of a new fence, and, according to his testimony, this line was run through west to the highway, and was marked by stakes set on the two tracts of land belonging to the plaintiffs, and some of them had knowledge of the fact that this line was south of the line of the old fence. But there is a controversy in the record as to what the conversation between Lind and J. C. Savage actually was, and we reach the conclusion that defendants have not shown by a preponderance of the evidence that J. C. Savage, or any other of the plaintiffs, was advised of any intention to construct a new fence between their property and the property of defendants along the line of this survey. The conversation may well be interpreted as having reference to a new fence east of the properties of plaintiffs, and, as already indicated, the fact that a jog in the fence line east of plaintiffs' property would result from the new survey was not a matter with which plaintiffs were concerned, and was not in itself sufficient to serve them with any notice of an intention to construct a new fence between their land and the land of the defendants. While this survey was being made, one Norton, an agent in charge of defendants' property, as he testifies, telephoned to the Savage home about the survey, stating that it did not appear to run where the old fence stood, and that, if there was dissatisfaction with the new line, Lind should

be notified. . No protest seems to have been made to Lind on the part of plaintiffs; but we can not understand why plaintiffs were under any obligation to make a protest against the running of the new line, in the absence of any proof that they were advised of any intention to construct a new fence across their land. Some time in the early part of October following the employees of defendants commenced to set posts on the new line from the east side of the east eighty; but the record does not show that any of the plaintiffs saw or had knowledge of the setting of these posts. Later, and apparently on the 10th of October, defendants' employees commenced setting posts along the new line from the west end—that is, upon J. C. Savage's eighty, and the contention for appellants is that J. C. Savage saw this line of posts extending part way across his eighty, and without objection arranged to have wire hauled to his land for the construction of his portion of the fence, understanding that defendants were about to place wire on the posts which he had seen. Whatever arrangement J. C. Savage made in this respect was on the 11th of October, and on the 12th he and his brothers removed the new and partially constructed fence from his land, having earlier on that day protested to the workmen against the construction of a fence on that line, and having been met with the response that they could be stopped only by the sheriff.

The estoppel contended for is predicated on the fact that on the 10th of October J. C. Savage knew that posts had been set on the new line, that on the 11th he acquiesced in the construction of a fence on that line by arranging for wire to be hauled for his portion of the fence, and that his protest was not made until the day following. What was done by the defendants between the time when J. C. Savage saw the posts set on the new line and the time when he first objected thereto was to stretch some wire fence on the posts thus set. Certainly this is a meager basis on which to predicate an estoppel. But the fundamental difficulty

with defendants' contention is that they failed to bring home to J. C. Savage any knowledge that the line of posts which he saw on the 10th departed substantially from the line of the old fence. It is conceded that the line of the old fence and the new line established by Surveyor Lind terminate at the west end at practically the same point, and that the divergence for some distance from this point to the eastward between the two lines is slight. We are satisfied that J. C. Savage was not bound to know, when he first saw these posts on the 10th, that there was any intention to construct the new fence substantially south of the line of the old fence. The entire divergence at the east line of the west eighty is only twenty feet, while at the east line of the east eighty it amounts to more than forty-two feet. We are unwilling to hold that, by reason of the casual observation which J. C. Savage gave or was bound to give to the slight divergence at the west end of the line, he was charged with notice of an intention that the new fence would depart substantially from the old fence along the entire line, with the effect that by making no protest until the wire had been stretched on these posts as he found it on the morning of the 12th he is estopped, and through him the other plaintiffs, co-owners with him of the east eighty are also estopped, from repudiating the line indicated by these posts as the true line between the land of plaintiffs and the land of defendants. According to the testimony of J. C. Savage, he did not know or understand that defendants were attempting to establish a new line until the morning of the 12th, and at that time he certainly acted with sufficient promptness in repudiating the new line.

We reach the conclusion that there is no basis for an estoppel, as against the plaintiffs, that the old fence represents the true line established by acquiescence between the lands of plaintiffs and those of defendants, and that the decree of the trial court is correct.

Appellants' motion to strike appellees' amendment to the abstract, on the ground that it is unnecessary and not prepared in accordance with the requirements of our rules, has been submitted with the case. On examination of appellees' amendment, we fail to find any good reason for striking it from the files, and the motion is overruled.

The decree of the trial court is—*Affirmed*.

SUSIE T. COOPER, Appellee, v. THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, Appellee, and LIZZIE B. COOPER, and JOHN N. COOPER, her guardian, Appellants.

Fraternal insurance: BENEFICIARIES: RIGHTS OF PARTIES. The beneficiary named in a certificate of mutual benefit insurance has no vested or property interest therein which is the subject of sale and transfer, and the extent of the insured's control over it is the right to select a new beneficiary; so that any promise on his part to keep the same in force for the benefit of another in case of the death of the beneficiary named, will not create an enforceable obligation. Thus where the rules of the association provided that in case the beneficiary was not living at the death of a member, his wife, if living, should be entitled to the benefit, but if not, then it should be paid to his children: *Held*, that upon the death of the beneficiary and later the assured, without change in beneficiary, his second wife was entitled to the benefit, although he had promised his first wife, the named beneficiary, that he would keep the certificate alive for the benefit of a child of the first wife.

Same: ESTOPPEL. The party claiming an estoppel has the burden of proof on that question. In the instant case the evidence is held insufficient to show that decedent's second wife was estopped from claiming the benefits under the certificate, as against a child by his first wife; the certificate as originally issued providing for payment of benefits to the widow, if living, and no change ever having been made.

Appeal from Linn District Court.—HON. W. N. TREICHLER, JUDGE.

TUESDAY, SEPTEMBER 24, 1912.

THE opinion states the case.—*Affirmed.*

C. V. Puryear, U. C. Blake, and Redmond & Stewart,
for appellants.

J. M. Robinson and Deacon, Good, Sargent & Spangler, for appellees.

WEAVER, J.—The defendant association is a mutual benefit organization, of which William F. Cooper was a member in good standing. On February 1, 1908, Cooper died, leaving his benefit certificate in full force. The association conceded its liability to pay the benefit of \$3,000 in full; but controversy having arisen as to the person entitled to receive it, this action was instituted. The fund has been deposited in court, to be paid over to the proper beneficiary when that question has been judicially determined. The facts, so far as material, are as follows:

By the rules of the society, if the beneficiary designated in the certificate is not living at the time of the member's death, the benefits thereby provided are to be paid to the first named of the following persons who may survive him: (1) His widow; (2) his child or children; (3) his father; (4) his mother; (5) his brothers and sisters. William F. Cooper became a member of the order July 28, 1897, and his benefit certificate was made payable to his wife, Alice F. Cooper. In September, 1897, Alice F. Cooper died, leaving an only child, an infant daughter, Lizzie D. Cooper, who is appellant herein. Five years later William F. Cooper married again; the wife of this marriage being Susie T. Cooper, who is plaintiff in this case. No new certificate was ever issued to the deceased by the defendant Order of Railway Conductors; but the original instrument was preserved, and plaintiff's claim of recovery

is based thereon. The daughter of the first marriage has been made a party to the proceeding, in order that her rights, if any she has, in the fund may be adjudicated. The plaintiff demands recovery on the theory that, as the wife of the deceased at the time of his death, the rules of the society and the express terms of the certificate entitle her to demand and receive the money, which was originally made payable to the former wife, who died before the certificate matured into a legal demand. On part of Lizzie D. Cooper it is claimed that, shortly prior to the death of the first wife and at her request, William F. Cooper promised and agreed to keep said certificate in force for the benefit of their said child, and that he did in fact pay the dues and charges thereon from time to time for that purpose, and placed the certificate in the hands of his father or brother, to be held for the said child. It is further alleged that plaintiff knew at all times that said certificate was being carried and kept in force for the child of the first marriage, and that she has so conducted herself with reference thereto as to estop her from now asserting any right in or to said benefits hostile to the claim of said child and her guardian. The trial court found for the plaintiff, and Lizzie D. Cooper and her guardian appeal.

There is no claim or testimony that William F. Cooper ever attempted to designate or substitute a new beneficiary in the manner provided by the rules and by-laws of the society, and counsel for appellant concede in argument that but for the alleged agreement made between said Cooper and his first wife, and the alleged recognition by plaintiff of the right of the child to succeed to said benefits, the express terms of the certificate would have to be observed and payment awarded to plaintiff. Admitting, as we may, for the purposes of this case, that the second wife could so act with relation to the insurance as to estop herself from claiming it adversely to a child of the deceased, we think it must be

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INSURANCE:
beneficiaries:
rights of
parties.

said the record fails to make the case for which the appellant contends. Even if the talk between Cooper and his first wife took place exactly as related by the witnesses, it was in no legal sense a contract. It was, at most, a request on her part and a promise on his part, creating, perhaps, a moral obligation; but it was an obligation for the enforcement of which neither law nor equity affords a remedy. The wife had no vested or property interest in the certificate or its prospective benefits. *Wandell v. Toilers*, 130 Iowa, 643. She had no right therein which she could sell or transfer to another. The husband himself had no property right in the insurance, and the extent of his control over it, if he chose to keep it in force, was to select a new beneficiary.

The utmost extent of appellant's showing in this respect is that Cooper promised his former wife to make such new selection. He failed to do so. Possibly he labored under the mistaken belief that the daughter, by virtue of her relation as heir of the wife, would succeed to the insurance without further action on his part. But, unfortunately for the child, such is not the case. By the express and unmistakable terms of the contract of insurance it is provided that if, upon the death of the member, the beneficiary therein named should not be living, the benefits shall pass to such member's widow. Had there been a *bona fide* attempt to make a change of beneficiaries, and it was sought to defeat the change because the prescribed method had not been followed with technical exactness, the writer would be disposed to disregard the irregularity and give effect to the clear intent. But here nothing whatever was done, except to keep alive and in force a contract of insurance providing upon its face for payment to a designated person, who upon the death of the member should stand in a certain relation to him. The plaintiff, his widow, did occupy that relation; the appellant did not. The necessary result is that the judgment below must be affirmed,

unless the court is able to hold, with appellant, that plaintiff has by her conduct, words, or attitude estopped herself from insisting upon her legal rights in the premises.

The burden of establishing such estoppel was upon the appellant, and in this we think the record discloses a distinct failure. Some of the most important testimony must be dis-

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estoppel. regarded, because of the incompetency of the witness, to whom objection was properly interposed. But, taking the whole case as made for the appellant, it does not appear by a fair preponderance that the plaintiff had any distinct knowledge or notice of the alleged agreement or understanding between her husband and the first wife concerning this insurance, or that she ever intelligently assented to its benefits being set apart for the use of the daughter. It may be, and there is much to indicate, that plaintiff, as well as other members of the family, supposed that, the certificate having been made payable primarily to the first wife, and the appellant being her only heir, the latter would stand in her mother's place and receive the benefits of the insurance; but it does not appear that appellant or her guardian were in any wise misled, to their injury, because of plaintiff's error or ignorance with respect to their mutual rights in the premises. It is also quite apparent that, as soon as plaintiff became aware that she was herself the beneficiary, she manifested an unwillingness to relinquish her rights and has since consistently refused to do so.

Something is said in argument on the subject of equitable assignments; but we find nothing in this case to which that doctrine can be made applicable. Neither party to the alleged agreement or understanding had anything which they could assign to appellant, or any other person. No consideration passed to or from any party to the alleged conversation. There is nothing upon which specific performance could have been enforced against either party, were Cooper still living. Upon the face of the contract,

plaintiff was entitled to recover, and appellant has failed to overcome the *prima facie* case thus made.

The trial court did not err, and the judgment below is—*Affirmed*.

BANKERS SURETY COMPANY, Appellant, v. HARRIET C. LINDER, CHARLES D. LEGGETT, as Executor of the Estate of JOHN LINDER, deceased; NANCY RUDDALL, D. H. KING, ARTHUR L. OSTRANDER, GLADDIE M. OSTRANDER; THOS. W. HANNAH, as Clerk of the District Court of Jefferson County, Iowa; B. W. GARRETT, as Clerk of the Supreme Court of Iowa, Appellees.

Suretyship: SUBROGATION. While as a general rule a surety can
1 not be subrogated to the rights of a creditor until he has paid the creditor's debt, still a court of equity has power to protect the rights of the surety who has been asked to pay the debt by a proper decree.

Same: NECESSITY OF PAYMENTS: REFUSAL: EFFECT. Where a creditor
2 was given judgment against his debtor and the same was made a lien on any interest the debtor had in certain land, and the surety on the debtor's supersedeas bond not only offered to pay the judgment on the bond rendered on appeal, provided its right of subrogation was protected, but before judgment was rendered against the debtor, made a tender of the amount and offer of payment provided the creditor would assign the judgment, the creditor was not justified in refusing the same on the ground that it would prejudice her individual right in the land or that of others under an alleged prior deed from the judgment debtor, and such refusal relieved the surety from paying the judgment until its right of subrogation was protected by proper decree; as the right of subrogation depends upon no request or contract of the debtor, but is entirely dependent upon the relations of surety and creditor.

Same: RIGHTS OF SURETY. By performing the obligation of surety-
3 ship the debt is discharged as respects the creditor but is kept alive as between all of the parties for the purpose of enforcing the rights of the surety.

Same: RELEASE OF SECURITIES: EFFECT. Upon payment of the debt
4 a surety is entitled to subrogation to all the securities held by

the creditor for its payment, from whatever source obtained; and if by act or conduct he releases the securities, or makes them unavailing to the surety, the surety is to that extent relieved.

Same: RIGHTS OF CREDITOR AFTER PAYMENT. After a creditor receives payment or its equivalent in equity, he has no right to interfere with any disposition of the judgment which the court makes between the defendants, or the surety and the principal debtor or a stranger to the litigation.

Same: APPEAL: GROUNDS FOR REVERSAL. Where a surety was entitled, before paying the judgment against it, on affirmance of the principal judgment, to a decree establishing its right to subrogation and to an assignment of the judgment, the dissolution of a temporary injunction in a suit to secure subrogation and an assignment of the judgment will be reversed, for the purpose of relieving it of liability on the bond, although in the meantime it had been compelled to make an involuntary payment of the judgment against it.

Same: ENFORCEMENT OF RIGHTS: JURISDICTION. Where the appellate court, on affirmance of the principal judgment, rendered judgment against the surety on the supersedeas bond, the district court had jurisdiction of a suit by the surety to protect its rights to subrogation before paying the principal judgment.

Same: ADJUDICATION. Upon affirmance of the principal judgment the appellee is entitled to judgment against the surety on the supersedeas bond, and the entry of such judgment is not an adjudication of the right of the surety to subrogation, or any of the questions which may be involved in a trial of that right, but it may thereafter enforce its right by suit in equity, or under the statute providing for subrogation.

Fraudulent conveyances: INJUNCTION: DISSOLUTION. In a suit to set aside a deed on the ground of forgery the plaintiff is entitled to an injunction restraining a disposition of the land pending the litigation; for even though the filing of the petition might operate as a *lis pendens* the plaintiff might be compelled to bring another action against a purchaser. And where fraud is alleged the filing of an answer in denial is not sufficient ground for dissolving a writ.

Suretyship: RIGHT OF SUBROGATION. Where one appeals from a judgment which was made a lien upon certain land, and upon affirmance of the judgment the plaintiff on motion also obtained judgment against the surety on the supersedeas bond, the original judgment was not merged in the latter so as to extinguish

the lien, so far as the surety is concerned, but the right of subrogation will be preserved to the surety.

Subrogation: EXTENT OF RIGHTS ACQUIRED. A surety acquires no greater right by subrogation than the creditor had; so that where the judgment against the debtor was made a lien upon certain real estate it would only affect the interest of the debtor, and by subrogation of the surety any interest therein of the creditor would not be affected.

Appeal from Jefferson District Court.—HON. F. M. HUNTER, JUDGE.

TUESDAY, SEPTEMBER 24, 1912.

SUIT in equity to enjoin the collection of a judgment, for a decree of subrogation, and for an order enjoining the transfer of certain lands pending the action. A temporary injunction and restraining order was issued, which, upon defendants' motion, was dissolved, and plaintiff appeals.—*Reversed and remanded.*

Boardman & Lawrence, for appellant.

McNett & McNett and *Chester W. Whitmore*, for appellees Linder et al.

Leggett & McKemey, for Chas. D. Leggett, executor of the estate of John Linder, deceased.

DEEMER, J.—John Linder, now deceased, was at one time the husband of Harriet C. Linder. Mrs. Linder had had previous matrimonial experiences, and as a result had four children by former husbands. Some time in the year 1908 she brought suit for divorce against her then husband, John, and in that action claimed title to 495 acres of land in Jefferson county, which stood on the records in the name of John Linder. Upon the trial of that case, decree of

divorce was refused; but Mrs. Linder was awarded, for separate support and attorney's fees, a judgment of something like \$2,000. John Linder was decreed to have vested interest in the land, and the judgment in favor of the wife was made a special lien upon the land. Mrs. Linder's children, although not made a party to the action, attended the trial, and all testified that John Linder had agreed to convey the land to their mother. John Linder appealed from this decree to this court, and, representing that he owned all the land in controversy in the suit, which statement the record confirmed, induced the plaintiff, the Bankers' Surety Company, to sign a supersedeas bond for him. The decree was rendered some time in the year 1909. John Linder died in April of the year 1910, while his appeal was pending, and within a few days after his death Harriet C. Linder and her four children, who are all made parties to this suit, produced and filed for record a deed for all the land in controversy purporting to have been made and executed some time in the year 1903. This deed, on its face, conveyed all the land in controversy to Mrs. Linder's four children. No one ever heard of this deed, unless it be the notary who acknowledged it during the life of John Linder; and no one testified or claimed, upon the hearing of the divorce case, that there was such a deed conveying the land to these defendants. In due course the appeal taken by Linder was disposed of in this court, resulting in an affirmance of the decree of the lower court. Thereafter Mrs. Linder filed a motion in this court for judgment against the surety company on the supersedeas bond. This was resisted by the surety company, unless Mrs. Linder assigned her judgment to said company in order that it might be subrogated to all of her rights. The motion for judgment against the surety company and against the executor of the estate of John Linder, he (Linder) having died pending the appeal, was sustained, and judgment rendered here, which provided that "this judgment shall be

without prejudice to said surety, the Bankers' Surety Company, to hereafter assert and enforce in any appropriate proceedings whatever right, if any, by way of subrogation or otherwise, it may have or be entitled to, as such surety, growing out of its obligation under the supersedeas bond or payment of this judgment." Thereupon the surety company filed a motion here for a special execution, enforcing its right of subrogation to Mrs. Linder's judgment, which was made a lien upon the land; but this motion was overruled. The order, however, contained this proviso, "without prejudice to any proceedings which it may institute in the proper court." The surety company then went into the district court of Jefferson county, from which court the original appeal came, with this action, which is to secure an order of subrogation to Mrs. Linder's rights under her judgment against John Linder, for an injunction to preserve the *status quo* until the final hearing, for an injunction against the children of Mrs. Linder to prevent their disposition of the lands pending the determination of the action, for a decree finding that the deed to these children was a forgery, or, if not a forgery, a fraud upon plaintiff's rights, and for a decree finding that the judgment was released, because Mrs. Linder, by her conduct, released the lien of her judgment against the land, from which the appeal was taken, and destroyed the security to which it, as a surety, was entitled to have from the original creditor. Other relief was also asked, which need not at this time be stated.

A temporary injunction issued as prayed. Defendants subsequently appeared and filed answer, in which they denied that the deed was either forged or fraudulent, and at the same time moved to dissolve the temporary writ of injunction, because the orders made by this court in the premises constituted an adjudication; because plaintiff was not entitled to subrogation before it paid the judgment; for the further reason that the district court had no power

to cancel the judgments rendered by this court; and because the deed to Mrs. Linder's children was neither a forgery, nor was it in fraud of the rights of Linder's creditors. The motion was supported by affidavits tending to show that the deed was not a forgery, and that there was no fraud in its making. Plaintiff also filed an affidavit, or affidavits, tending to show that it was a forgery, and also relied upon the allegations of the petition, which were sworn to, as tending to show fraud. The motion was submitted to the trial court and by it sustained, and the appeal is from that ruling. It should be stated, however, that the order with reference to the dissolution of that part of the injunction restraining defendants from disposing of the land contained this condition: The motion "is hereby for the present overruled, but however, upon the following condition: That if the plaintiff shall, within thirty days from the date of this order, pay the said judgment in favor of Harriet C. Linder in the Supreme Court of Iowa, then the said temporary injunction shall continue until the hearing of this cause upon its merits, or until the further orders of this court, in respect thereto; but if the plaintiff shall fail to pay said judgment within the said thirty days, then this order shall operate to overrule the entire temporary injunction heretofore ordered in this cause. And it is further ordered that if the said Bankers' Surety Company shall pay said judgment in the Supreme Court within the said time, the said Harriett C. Linder shall then make an assignment over to the plaintiff of said judgment rendered in her favor in the Supreme Court, as provided by Code, section 3967. To that part of the foregoing order refusing to unconditionally dissolve the entire temporary injunction heretofore granted, the said answering defendants at the time excepted."

Counsel on either side have made statements as to subsequent proceedings not sustained by the record; but they all agree, and so state in argument, that since the

order for dissolution was made, but after the expiration of the thirty days provided for by the order of the district court, the surety company, in virtue of rulings on motions in this court, was compelled to and did pay the judgment rendered against it here on the supersedeas bond. On the face of the record, it would seem that the appeal from that part of the order dissolving the injunction which restrained the collection of the judgment involves nothing more than a moot question; for by concessions of counsel the judgment here against the surety company has now been fully paid. Counsel for appellees also say in effect that there is no reason for a reversal of that part of the order dissolving the injunction restraining defendants from disposing of the land, because this action is itself a *lis pendens*, and gives notice to any purchaser of the land. As to this, more hereafter. The theory upon which the entire matter was disposed of in the district court seems to have been that until the surety company paid the judgment or the debt for which it became liable it was not entitled to any decree of subrogation, or to any collateral orders which might be granted to effectuate such an equity. That being the situation, it is important to note a few more facts gathered from the record. When the motion for judgment in this court upon the supersedeas bond was submitted, the surety company resisted the same, upon the ground that it had tendered to Mrs. Linder whatever amount was legally due her, upon condition that its right to subrogation be protected, and this Mrs. Linder refused to do; and it also averred in this action that it was ready, able, and willing to pay the judgment held by Mrs. Linder, and offered to do so, provided its right as surety to be subrogated be protected. It also averred that it was ready to pay the judgment to the clerk of this court, provided the said clerk would issue the same kind of special execution against the real estate that he would have issued had Mrs. Linder asked the same; and that the clerk refused to do so. It

also pleaded that Mrs. Linder by her conduct has discharged the lien of her judgment against the land of John Linder, and that to the extent of the value thereof it has been discharged. Attached to the petitions was the tender made by the surety company to Mrs. Linder and her response thereto. The tender was upon this condition: "As a condition precedent to this payment, we require of you an assignment of any and all claims you may have in said litigation against John C. Linder, his estate and real estate, including any judgment against John C. Linder, his estate and lands. In other words, the Bankers' Surety Company's liability arises solely because it signed an appeal bond as surety for John C. Linder. The Bankers' Surety Company claims the right, as such surety, to receive, unimpaired, all the rights you have against John C. Linder, his lands and estates. If it, as surety, pays this debt of John C. Linder's, it claims the right to be subrogated to all your rights, and to be put in your place, and to avail itself of every means which you have to enforce payment against John C. Linder. If you are willing, upon our payment to you of the above amount, to place us in possession of your rights, then we are willing to make immediate payment, and herewith tender same upon that condition. We request an indication of your willingness, or unwillingness, to do this." The response to this tender was in this language: "Harriet C. Linder acknowledges receipt of copy of this tender, and acknowledges that the Bankers' Surety Company has tendered, in lawful money of the United States, the correct amount and herewith states that said tender upon the conditions named is refused, and that she, Harriet C. Linder, is not willing to perform the conditions annexed to said tender."

Now, while it is true as a general rule that a surety is not entitled to be subrogated to the rights of the creditor until he has paid the debt, a court of equity will nevertheless protect a surety who is asked to pay the debt by a

proper decree. In *City of Keokuk v. Love*, 31 Iowa, 119, this court said: "It is further claimed by the appellees' counsel that the right of subrogation can not exist until the sureties have paid off the obligation of their principal; that such payment was not made when the judgment in this case was rendered; and hence they had then no right to be subrogated, and their subsequent payment could give them no claim for a reversal in this court, which must review the case tried below, and not decide a new case. All this is answered by the single proposition that the power of a court of equity is not limited to settling the rights of the parties upon what has been done in the past, but it reaches forth and declares their duties and rights for the future; and, in the exercise of this latter power, it should have decreed that when the sureties paid the debt of their principal they should be subrogated to the rights of the creditor." See, also, *Manning v. Ferguson*, 103 Iowa, 561.

In the instant case plaintiff was not only seeking to do equity by offering to pay the judgment rendered by this court, provided its equity of subrogation was protected; but before the judgment was rendered it had made a tender or offer to pay the amount of the judgment, provided Mrs. Linder would assign her judgment to it. Neither offer nor tender would Mrs. Linder accept; and we are of the opinion that in this she was in fault, and that such fault relieved the surety company from paying the judgment until it was protected by a proper decree or order preserving its right of subrogation. The assigned reason for Mrs. Linder's refusal was that her assignment of the judgment might prejudice her independent claim to the real estate. As to this, it is true that the deed under which her children are now claiming reserved a life estate in herself and John Linder for and during their lives or the life of the survivor, and gave them the right to the use, occupancy, and enjoyment of the

1. SURETYSHIP:
subrogation.

2. SAME: neces-
sity of pay-
ment: refusal:
effect.

land during that period. But it is also true that the judgment obtained by her, which was affirmed by this court, was made a special lien upon the land, which, of course, means a lien upon any interest which John Linder may have had in the land, and not upon her interest, or upon that of any of her children. The harm to be feared had already been done. She had the right to rely upon her judgment, which was made a lien upon John Linder's interest in the land; and by taking such judgment she asserted that he had some interest subject to levy. Having elected to take the judgment and to have that judgment affirmed in this court, she estopped herself from claiming that she herself was the owner of the land, and that her husband had no interest therein which was subject to levy. Her assignment of the judgment to the surety company could, therefore, add nothing to what she had already done. On the other hand, she had no right to protect her children by withholding the assignment. Refusing to make an assignment of the judgment upon payment of the amount to her would amount to a fraud upon the surety. It is well settled that the right of a surety to demand of a creditor whose debt he has paid the securities he holds against the principal debtor, and to stand in his shoes, does not depend at all upon any request or contract on the part of the debtor with the surety, but grows, rather, out of the relations existing between the surety and the creditor, and is founded, not upon any contract, but springs from the most obvious principles of natural justice. *Mathews v. Aikin*, 1 N. Y. 595; *McArthur v. Martin*, 23 Minn. 74.

By performing the contract of suretyship, the principal obligation is discharged against the creditor, and is kept alive between the creditor, the debtor, and the surety for the purpose of enforcing the rights of the last. *McCormick v. Irwin*, 35 Pa. 111; *Edgerly v. Emerson*, 23 N. H. 555 (55 Am. Dec.

3. SAME: rights of surety.

207); *Eddy v. Traver*, 6 Paige (N. Y.) 521, (31 Am. Dec. 261).

Again it makes no difference from whom or how the creditor obtains his securities. The surety is entitled to subrogation to all the securities held by the creditor for the payment of the debt, no matter from whom obtained; and if by any act or conduct he releases the securities, or makes them un-
 4. SAME: release of securities: effect. availing to the surety, the surety is to that extent relieved. These rules are sustained by abundant authority. *Gerber v. Sharp*, 72 Ind. 553; *Nelson v. Munch*, 28 Minn. 314 (9 N. W. 863); *Cullum v. Emanuel*, 1 Ala. 23 (34 Am. Dec. 757).

One other rule is very well settled, and that is: After the creditor receives payment, or what equity regards as the equivalent, he has no right to interfere with any dis-
 5. SAME: rights of creditor after payment. position which the court thinks proper to make of the judgment as between the defendants, or the surety and the principal debtor or some stranger to the original litigation. *Springer v. Springer*, 43 Pa. 518. These rules all apply to suits or judgments held by the creditor. *Edgerly v. Emerson*, 23 N. H. 555 (55 Am. Dec. 207).

It follows from what we have said that the surety company was entitled to a decree establishing its right to subrogation and providing for an assignment of Mrs. Linder's judgment before paying the judgment; and
 6. SAME: appeal: grounds for reversal. the motion to dissolve this part of the injunction should not have been sustained, unless it be for some reason suggested by appellees' counsel in answer to these rules. It is said that as plaintiff has paid the judgment nothing is to be gained from reinstating the injunction. If the payment had been voluntary, perhaps this would be true. But it was not. The surety company, in virtue of the dissolution of the injunction, was compelled to make an involuntary payment, and this without

any provision for subrogation. It was entitled to have the prayer of the petition sustained without making the payment; and the involuntary payment should not in any respect be held to jeopardize its rights. It should not be placed in a position to be held responsible on its injunction bond by reason of its involuntary payment of the judgment.

It is said that the district court had no control over the processes of this court, and therefore no jurisdiction of this matter. This argument is fallacious. The judgment had been rendered here upon motion; but the orders each expressly recite that they are without prejudice to the right of the surety to proceed in the district court to enforce its right of subrogation. Plaintiff was expressly remanded to the district court to work out its equity; and that court had full power to protect it by the issuance of the necessary writs. None of the authorities cited by appellees run counter to the views herein expressed. Appellees further say that the doctrine of subrogation is not involved; but we think it most certainly was when plaintiff commenced its action, and, as it had not voluntarily dismissed its action or paid the judgment without being given its equitable rights, it may still insist that the order of the district court was erroneous.

Again, it is said that Mrs. Linder is not contesting the right of the subrogation, but denying that there is anything for plaintiff to be subrogated to. We have already intimated that this matter should not be tried out by motion to dissolve; that she has made her election; and that she is in no manner interested in the result of the litigation between plaintiff and her children with reference to their title to the land.

Again, it is said that the orders of this court upon the motions already referred to constitute an adjudication to the effect that plaintiff is not entitled to subrogation, or,

if entitled thereto, that such relief will not be granted until plaintiff pays the judgment. The creditor,

8. SAME:
adjudication.

Mrs. Linder, was by statute entitled, upon affirmance of the judgment here, to a judgment against the surety company on its supersedeas bond upon motion duly filed. Code, section 4140. And this statute is undoubtedly constitutional. *Jewett v. Shoemaker*, 124 Iowa, 561; *Beall v. New Mexico*, 16 Wall. (U. S.) 535 (21 L. Ed. 292).

In ordering the judgment against the plaintiff as surety upon the supersedeas bond, there was no adjudication whatever as to its right of subrogation. After judgment, it could undoubtedly enforce its equitable right of subrogation by an independent action in equity, or it might have proceeded under section 3967 of the Code, which reads as follows: "When the principal and surety are liable for any claim, such surety may pay the same, and recover thereon against all liable to him. If a judgment against principal and surety had been paid by the surety, he shall be subrogated to all the rights of the creditor, and may take an assignment thereof, and enforce the same by execution or otherwise, as the creditor could have done. All questions between the parties thereto may be heard and determined on motion by the court or a judge thereof, upon such notice as may be prescribed by it or him."

This statutory remedy is manifestly not exclusive. And an independent action in equity will lie, as already indicated in what precedes. So that the judgment ordered by this court against the surety on the supersedeas bond did not in any manner adjudicate plaintiff's right to subrogation; and the orders entered by this court expressly reserved the question of subrogation for another court by appropriate proceedings. It is also true that this court, on motion, denied plaintiff the right to a special execution upon the judgment in favor of Harriet C. Linder; but this did not determine its right to equitable subrogation, and the order of this court on that motion reserved the question.

Even if this were not true until plaintiff paid the judgment, it was not entitled to the execution. Such a proceeding would be at law, and to an execution before paying the judgment plaintiff was not entitled. Moreover, it was then made to appear that certain strangers claimed the land, and this court, as an appellate tribunal, would not undertake an independent inquiry as to the claims of strangers to the title.

It is said in argument, but not supported by the record, that after the appeal to this court one of the judges entered a restraining order preserving the *status quo*, which was afterward dissolved upon motion; but it is manifest that, even if this be true, it did not constitute an adjudication of plaintiff's rights in the premises. In each and every order made by this court, there was an express provision saving plaintiff's rights and equities, so that there is no adjudication binding upon it which deprives it of the right to proceed with its equitable suit for subrogation. It is apparent from what has been said that this suit will involve many questions which could not be heard by this court, among them the following: (1) Was the deed from Linder to the children of Mrs. Linder a forgery? (2) Was the deed, or rather the withholding of the same from record, a fraud? (3) Are the grantees in that deed estopped from claiming thereunder? (4) Is Mrs. Linder estopped from asserting that her husband did not have any interest in the land upon which her judgment was made a lien? (5) Although the deed to the children may be good, is plaintiff entitled to have the Linder judgment made a lien thereon?

None of these questions could properly be determined upon motion in this court; and it was these questions, together with the right to equitable subrogation, which were expressly reserved for determination by a proper tribunal—the district court. This court never decided that plaintiff did not have an equitable remedy of subrogation be-

fore paying the judgment against it. The only doubtful question, if it appeared of record and could be considered on this appeal, would be the effect of the ruling dissolving the restraining order issued by one of the judges of this court. All orders save the last entered by this court, or rather all orders preserving to plaintiff its right, were entered with the express consent of, and some of them upon the suggestion of, appellees or their counsel that this was the proper method for working out the equity of subrogation. The last order, which counsel say was made, simply dissolved a restraining order issued by one of the judges of this court; and that, of course, constituted no adjudication of plaintiff's rights.

II. But counsel say that there is no reason for any injunction now; and that the order of the district court should not be reversed. It is true plaintiff has paid the judgment, and that an injunction will not help

9. FRAUDULENT
CONVEYANCES:
injunction:
dissolution.

in this respect; but for reasons already stated we think it is entitled to an adjudication of this question, and to a reversal of the order in that respect. As to that part of the order restraining defendants from disposing of, incumbering, or transferring the land, we think there should have been no dissolution of the writ. Plaintiff had the right to have the *status quo* preserved pending litigation. *Norris v. Tripp*, 111 Iowa, 115; *Luce v. Fensler*, 85 Iowa, 596; *Manning v. Poling*, 114 Iowa, 26; *Teabout v. Jaffray*, 74 Iowa, 28; *Kelly v. Briggs*, 58 Iowa, 332.

It is no answer to say that the filing of the petition is *lis pendens*; for were it so the plaintiff might be compelled to resort to another action against a purchaser to enforce his rights. Fraud being charged, the filing of an answer in denial was not sufficient ground for dissolving the writ. *Walker v. Stone*, 70 Iowa, 103; *Hayes v. Billings*, 69 Iowa, 387; *Shricker v. Field*, 9 Iowa, 366; *Judd v. Hatch*, 31 Iowa, 491.

III. Again, it is contended that, as Mrs. Linder took judgment in this court on her motion for such judgment on the supersedeas bond, the judgment in the district court, with its lien upon the real estate, ceased to exist; and that plaintiff has nothing in which to be subrogated. This position, even if true, would ordinarily be fraught with danger; and but for the fact that Mrs. Linder has secured her money, as we are informed, it is doubtful if such a position would be assumed. This cancellation of the lien, if it happened at all, was due, not to any act of the plaintiff, but wholly to Mrs. Linder's conduct. If the lien of the original judgment has been extinguished, it was due to Mrs. Linder's act, and to her alone. Ordinarily, if a creditor does anything which releases a security held by her, she, to that extent, releases a surety. As she was pursuing a statutory remedy, it may be that she did not release the plaintiff as surety; but if that be true the original lien must be preserved to the surety by relation back to the situation when he became a surety. Mrs. Linder must take one horn or the other of this dilemma. Either the lien is preserved, and is as potent for plaintiff to-day as it was when it became a surety, and with the same force and effect as if Mrs. Linder were then endeavoring to enforce it against the property, or she, by her acts and conduct, without the consent of plaintiff and against its protest, released and discharged the lien, and to that extent discharged the surety. Neither position will avail here. We concede, of course, that for some purposes there was a merger, as in *Swift v. Conboy*, 12 Iowa, 444; but, in so far as the rights of a surety are concerned, there is either no merger, or else there was a release of the surety. We need not determine which is the proper rule here. The cases, however, seem to hold that the rights of the creditor will be preserved to the surety under such circumstances.

10. SURETYSHIP:
right of
subrogation.

IV. Lastly, it is contended that to award plaintiff

subrogation will deprive Mrs. Linder of her life estate in the land reserved to her in the deed of her husband, under which her children claim. But this can not be so. While the judgment is made a lien upon the land, it, of course, is not a lien upon any interest the judgment creditor may have in the land. The lien must of necessity be upon the interest of the judgment debtor. Of course, there might be an estoppel upon the creditor to claim that any part of the land is his; but this would not arise because of the assignment to a surety who paid the debt. Such an estoppel would grow out of antecedent conduct, if at all, and, it may be, could not be pleaded by one who took the judgment by subrogation. Upon that proposition we express no opinion at this time, although we recognize the general rule that one by subrogation gets no greater rights than the creditor would have had. We have, perhaps, unduly extended this opinion. The excuse, if any, is to be found in the peculiar facts of the case. Reduced to the last analysis, it appears that plaintiff is liable for or has paid a judgment held by Mrs. Linder against John Linder, for the payment of which judgment plaintiff was liable as a surety. This judgment was expressly made a lien upon certain lands, the title to which then stood in the name of the judgment debtor, John Linder. On the strength of Linder's ownership of the land, plaintiff became secondarily responsible for the payment of the judgment. Upon motion, it has become primarily responsible to the judgment creditor, and, as we are informed, has been compelled to pay this judgment. It now asks that it be subrogated to the judgment creditor's rights under the judgment; but this is denied, and the creditor wishes to keep, not only the money arising from the judgment, which was made a lien upon the land, but also to either keep the land itself, or protect a life estate in herself and the remainder in her children, and this in the face of allegations that the deed is a forgery, was withheld from

11. SUBROGATION:
extent of
rights
acquired.

the records for more than seven years, and not made public until the death of the grantor, John Linder, was a fraud upon creditors, and in the face of further allegations showing such conduct on the part of the grantees in this deed as throws extreme doubt upon the good faith of the transaction, even if it does not entirely estop them from asserting title. Surely such facts, if true, call for equitable interference and the preservation of the *status quo* until the matter may be fully investigated. We have not undertaken to cite many authorities on the question of subrogation, and no attempt has been made to collect and collate our own. The general principles announced are well understood and really not in dispute, and the only real questions are the application thereof to the facts and a determination of the proper remedies, whereby the equities may be worked out.

It follows from what we have said that the orders and judgment of the district court must be and they are reversed, and the cause is remanded for trial upon the merits and a reinstatement of the temporary writ of injunction, in so far as necessary to preserve the *status quo*.—*Reversed and remanded.*

GEORGE F. MATT, et al., Appellants, v. WILLIAM R. MATT and wife, Appellees. (And two other cases against the same defendants consolidated.)

Trusts: EVIDENCE. In this suit to impress a trust upon land held
1 by defendant the evidence is reviewed and held insufficient to establish the trust agreement relied upon by the intervener.

Same: MORTGAGE PROVISIONS: ENDORSEMENT ON NOTES: EFFECT. Where
2 certain provisions are expressed in a mortgage the fact that the same appear as endorsements on the back of notes secured by the mortgage neither adds nor detracts to the force of the provisions, as between the original parties; as where the mortgage provided that the mortgagor should not be liable beyond the valuation of the land. But as the notes in this instance were

placed with third parties as collateral security the indorsement was proper because conveying notice of the mortgage provisions to the holders.

Same: PRIOR NEGOTIATIONS: EVIDENCE: NOTICE. The provisions of
3 a mortgage as finally executed can not be affected by a letter written during negotiations leading up to its execution: Nor can parties interested complain of want of notice of the provisions contained in a mortgage duly recorded.

Same: ACTION TO ESTABLISH A TRUST: ESTOPPEL. Where land was
4 conveyed to a son, reserving a life estate to the grantors, with a mortgage back for the benefit of his brothers and sisters, and thereafter the surviving mother brought suit to set aside the transaction and recover her distributive share, to which the beneficiaries were made parties, but none of whom questioned the grantee's ownership and some of them made affidavit in support of his title, they could not thereafter claim that he held title subject to any trust in their favor different from that expressed in the mortgage.

Reformation of instruments: CONSTRUCTIVE TRUSTS: EVIDENCE. The
5 evidence in this case is held insufficient to authorize reformation of the writings, so as to make an equal distribution of the proceeds of the land held by defendant among his brothers and sisters; or to establish a constructive trust in their favor on the theory of fraud, which must be by clear and satisfactory evidence.

Appeal from Boone District Court.—HON. CHARLES E. ALBROOK, JUDGE.

FRIDAY, SEPTEMBER 27, 1912.

SUIT in equity to impress a trust upon the title or estate held by the defendant, Wm. R. Matt. There was a decree for the defendant, and all other parties appeal.—*Affirmed.*

D. G. Baker and Whitaker & Snell, for appellants.

Goodykoontz & Mahoney and Stevens & Fry, for appellees.

EVANS, J.—Three separate actions were originally instituted against the defendant. In two of these actions the plaintiffs comprise the five living brothers of the defendant. In the third action the plaintiff therein is the mother of the defendant. These actions were all consolidated. Thereafter certain interveners appeared and joined with the plaintiffs. These interveners comprise a sister of the defendant, Mary Heuberger, and the widow and children of the deceased brother, Charles. At the close of the evidence in the court below, the action brought by the mother as plaintiff was dismissed. We have before us, therefore, only the controversies between the parties in the two remaining actions as consolidated.

The transactions out of which the controversy has arisen had their origin in March, 1886. The plaintiffs and defendants are all sons of Silas Matt, formerly of Boone county. The children of Silas consisted of seven sons and one daughter, as follows: George, Francis (known as Frank), James, Joseph, Arnold F. (known as Fred), William R., Charles, and Mary. From the finding of the trial court we quote the following history as being in accord with the record:

I find as the history of the matters involved: That some time in the 60's Silas F. Matt and his wife, Marie A. Matt, settled in Boone county, Iowa, and as a result of their united effort became possessed of a family of eight children and of the land in plaintiff's petition described. That in the year 1886 Silas F. Matt, then being past eighty-four years of age and being somewhat out of health, and his wife being well advanced in years and not of vigorous physical condition, and the said Silas F. Matt having become somewhat involved financially by being induced to sign notes for two of his sons, and thus becoming somewhat obligated in larger amounts to pay these sums, concluded that it was best to put his property into such shape that he and his wife might be sure of their life support, and yet something be left for certain members of the family after the departure from this life of himself and

his wife, Marie A. Matt. He accordingly secured the services of a practicing lawyer of good standing and in good repute to aid him in thus adjusting his property rights and titles. Accordingly, in the month of March of said year, the said lawyer, being Mr. Jordan of Boone, did prepare the papers decided upon, and resorted to the home of Silas F. Matt in Boone, where he met Mrs. Heuberger, the intervener herein, and a deed of conveyance was made and executed by Silas F. Matt and wife conveying the real property described in plaintiff's petition to the said Mrs. Heuberger, she being the only daughter of the said Silas F. Matt and Marie A. Matt, reserving to Silas F. Matt and Marie A. Matt the life use to each of them of said property, and with no other limitations. At the same time, as a part of the same transaction, the said Mrs. Heuberger made and delivered to her father, Silas F. Matt, a certain mortgage incumbering her title thus obtained for the sum of \$6,666.66, and in favor of William R. Matt, Charles D. Matt, Francis S. Matt, George Matt, and James Matt, obligating the said Mary A. Heuberger to pay to each of the parties above named \$1,333.33 on or before two years after the death of Silas F. Matt and Marie A. Matt. The said deed and mortgage were duly filed for record in the office of the recorder in and for Boone county, Iowa, on the 5th day of April, 1886.

Subsequently Mrs. Heuberger, with her husband, removed to California, and some of the parties interested in this property and Silas F. Matt became dissatisfied with the situation and the absence of Mrs. Heuberger from the immediate vicinity of the real property in question, and such negotiations were had that the said Mrs. Heuberger and her husband, John Heuberger, conveyed their interest in the land in question to William R. Matt, the defendant in this proceeding, by warranty deed, with the same reservation in the instrument as was inserted in the deed originally executed and delivered by Silas F. Matt and Marie A. Matt to Mary Heuberger. The mortgage executed by Mrs. Heuberger was canceled of record by the mortgagees. A part of the land was sold by William R. Matt and Silas F. Matt to Frank Adix, and a part by the same parties to Andrew Nelson, and the proceeds of those sales was used to discharge obligations of Silas F. Matt and

Marie A. Matt, Fred Matt, and another son, which obligations the said Silas F. Matt was held and bound to pay. A mortgage was then executed by William R. Matt and wife for sum of \$5,000 payable to Mary A. Heuberger, Charles D. Matt, Francis S. Matt, George F. Matt, and James F. Matt, securing to each of the parties named \$1,000 to be paid on or before two years after the death of Silas F. Matt and Marie A. Matt. There was omitted from this mortgage that was included in the Heuberger mortgage the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 21, being the eighty acres sold to Adix and Nelson. These instruments or conveyance were duly recorded in the recorder's office in Boone county, Iowa, on the 19th day of May, 1887, as were the various releases releasing the Heuberger mortgage to her brothers. Silas F. Matt died in the spring of 1888.

In 1899 Marie A. Matt commenced her action in the district court of Boone county, Iowa, against all the parties who are now parties to this action, alleging that the deed to Mary A. Heuberger was procured by fraud, and averred that neither she nor Silas F. Matt knew that the instrument was in fact a deed when they signed it. This suit, thus commenced, was subsequently compromised, and Marie A. Matt quitclaimed her interest in the real property in controversy in that proceeding, being the same as in this, to the defendant in this suit, William R. Matt. The petition in that proceeding was duly sworn to by Marie A. Matt. In 1901 the defendant sold to one Jordan the thirty-four acres described in the previous conveyances, and conveyed the same by warranty deed, which deed was duly recorded in the office of the recorder of Boone county, Iowa, on the 7th day of June, 1901. On the 3d day of February, 1910, the plaintiffs filed in this court several petitions against the defendant, charging that the intervener had by means of getting Silas F. Matt and Marie A. Matt under the influence of intoxicating liquors fraudulently procured the conveyance to be made to her by Silas F. Matt and Marie A. Matt hereinbefore referred to; that the defendant in this suit was employed soon after by Silas F. Matt and Marie A. Matt, and all their children save the defendant and the intervener, as their agent to get a reconveyance of said lands and protect their interest therein; that the defendant fraudulently did secure to himself the conveyance

made by said Mrs. Heuberger to him, above referred to, in violation of said agreement and arrangement so made. On the 13th day of April, 1910 the plaintiffs filed their amended and substituted petition in this case, declaring that the defendant held the lands in dispute in trust, and basing their claim upon an alleged written agreement executed by the intervener between herself, Mary A. Heuberger, and her father at the time the deed was executed by her father to her in 1886. This is the first intimation of record of any such claim being made.

It is proven, and, in fact, not in dispute, that at that time, in March, 1886, Silas F. Matt was about eighty-four years old, in poor health, and quite seriously crowded for means to meet his obligations, and in such sore distress that he employed an attorney to extricate him, if possible. Marie A. Matt, his wife, was in feeble health, and quite advanced in years as well. The land owned by them, being about 354 acres, was worth about \$20 an acre, possibly a little more and possibly a little less. The prospects of life for Silas F. Matt and Marie A. Matt were not flattering, a demise was likely to come at any time, and, in fact, in less than two years Silas F. Matt passed away. Now, when the deal was closed, Mary A. Heuberger had absolute title in fee to this land, and had given back a mortgage for \$6,666.66 to be paid in two years after the said Silas and Marie Matt passed away; Mary's title, however, being subject to the life estate of Silas and Marie. The undertaking of Mary A. Heuberger was absolute. She agreed to pay each of the parties named the sum therein expressed at a time sure to come, but having no fixed date.

This statement should be supplemented with a few details. To that end, we quote from appellee's statement of facts as follows:

On March 26, 1886, Silas Matt and his wife were living in their homestead property in Boone. This property was owned by Silas Matt, but it is not involved in the case at bar. All of the children were grown and married and living away from the parental home. During the seven or eight years preceding the transaction in question Silas Matt had lost considerable money by reason of being compelled

to pay debts for some of his children, other than the appellee Wm. R. Matt, particularly Arnold F. Matt and Joseph A. Matt. Joseph A. Matt had left home when he was eighteen years of age, being eleven years before the date in question, and his mother never knew where he was until he visited them in 1909. From the time he left home up to 1908 his family did not know where he was, until Frank found out twelve years ago. The appellee Wm. R. Matt was at that time living near Story City, about twenty miles from Boone and some twelve miles from the farm in controversy. The appellant George F. Matt was living in Nebraska, and the other sons, except Joseph A., were living in or around Boone, and the daughter, Mary A. Heuberger, was living in Boone. Silas Matt consulted an attorney as to what was best to do with the property in view of his age and situation, and the result was that on the evening of March 26, 1886, Mr. R. F. Jordan, the attorney in question, went to the home of Silas Matt, and while he was there the transaction took place that finally resulted in this litigation. As to what took place there, the admitted facts are: That on that evening Silas Matt and his wife executed a warranty deed covering the land above described, consisting of 354 acres, to Mary A. Heuberger, being a warranty deed in the usual and ordinary form, except the following clause therein: 'Said grantors, however, are to retain and be entitled to the use, possession and control of said premises during the term of their natural life or the life of the survivor of either of them, nothing in this deed shall be construed to impair said rights.' The expressed consideration of the deed was \$8,000 and love and affection. At the same time Mary Heuberger gave a mortgage covering the premises for the sum of \$6,666.66 running to the appellee Wm. R. and appellants George, Frank, and James, and Charles D. (now deceased), being for \$1,333.33 for each, due two years after the death of Silas and Marie A. Matt, with interest after maturity, at six percent. The mortgage recites: 'This mortgage is given for a portion of the purchase price of said premises.' There were present at the time Mary Heuberger, one Mrs. Girth, Silas Matt and wife, Marie A. Matt, R. F. Jordan, and one Etta Slates, then a child. Of these Silas Matt died in 1888 and F. R.

Jordan died in 1901, and only Mrs. Marie A. Matt and Mary A. Heuberger appeared as witnesses in this case.

In addition to these admitted facts, appellants claim that as a part of the same transaction a trust agreement was executed by Mary A. Heuberger. Mary A. Heuberger is the only party who so testified in the case. . . . The next transfer of title was made by Mary A. Heuberger to the appellee by warranty deed of date April 8, 1887. This warranty deed was in the usual and ordinary form, except that it was made subject to a life estate in said premises to Silas Matt and Marie A. Matt during their lives and the life of the survivor. This deed was executed in California, with the expressed consideration of \$8,000, and was recorded in the office of the recorder of Boone county, Iowa, on the 19th day of May, 1887. On April 25, 1887, the appellee and his wife executed a mortgage covering all of the premises except eighty acres that will be hereafter referred to, said mortgage running to Mary A. Heuberger, Charles D. Matt, Frank S. Matt, George F. Matt, and James L. Matt, for the sum of \$5,000, and said mortgage refers to notes aggregating \$1,000 each, for each of the five mortgages above mentioned, said notes payable two years after the death of Silas and Marie A. Matt with interest at 6 percent after maturity. The mortgage contains this further condition: 'I agree to be bound on the payment of the notes above secured only to the sum the land may bring on sale, the consideration of these notes is for the purchase price of the land.' This mortgage was recorded in the office of the recorder of Boone county, Iowa, on May 19, 1887. At the same time Wm. R. Matt executed the notes referred to in the mortgage, all of the form of Exhibit C, and each with indorsement on the back, which indorsements are all identical with that set out on the back of Exhibit C, except that on the note of Charles D. Matt the indorsement is 'for more or less.' On May 18, 1887, Wm. R. Matt and wife and Silas Matt and wife executed separate warranty deeds covering forty acres of land, conveyed by Mary Heuberger to Wm. R. Matt, but not included in the mortgage, to Andrew Nelson. The expressed consideration of each deed was \$750. On the same day—i. e., May 18, 1887—Wm. R. Matt and wife and Silas Matt and wife executed separate warranty deeds covering

another forty acres of land included in the deed by Mary A. Heuberger to Wm. R. Matt, but not included in the mortgage to Franz Adix. The expressed consideration of each deed was \$750. Seven hundred and fifty dollars was the total price paid by Mr. Nelson for the forty acres he purchased, and \$750 was the total price paid by Mr. Adix for the forty acres he purchased. These deeds were likewise recorded in the office of the recorder of Boone county, Iowa, on May 19, 1887. The mortgage given by Mary Heuberger to her brothers as above referred to was released on the margin of the record April 25, 1887, by W. R. Matt, Frank S. Matt, and C. D. Matt, and George F. Matt and James L. Matt released said mortgage by written release, dated April 30, 1887, and filed for record May 19, 1887. When the transfer was made from Mary to Wm. R., George and James were living at the same place in Nebraska, Mary in California, Joseph on his farm near Story City, Iowa, Charles was living in Hamilton county, near Jewell Junction, Iowa, and Frank and Arnold F. were living in or near Boone. Arnold F. is generally referred to in the testimony as Fred. The indorsement written upon the back of the notes was as follows: 'The consideration of this note is a 1-6 interest in certain land in Boone county, Iowa, formerly owned by Silas Matt. Should said land sell for \$6,000.00 or more than this note is to be paid in full, but should said land sell for less than \$6,000.00 then this note should be good for only 1-6 of what the land brings. This is in accordance with a contract between these parties of date April 25, 1887. W. R. Matt.' This indorsement upon the note to George Matt was written by Attorney Jordan at the time of the execution of the papers. The indorsements upon the other notes were written later. The notes to Mary and James were delivered to Lafe Zimbleman as agent. The indorsements upon these notes were in his handwriting. The indorsement on the note to Frank was written by the cashier of a bank which received the note from Frank as collateral security. The indorsement on the back of the note to Charles varies in form from the others. It can not be determined from the evidence in this record who wrote it, nor under what circumstances it was written. Charles died testate in 1890, and bequeathed the '\$1,000' note to his

wife and children. Silas died in 1888, leaving his widow, who has survived him to the present time.

The following quotation from appellant's brief is a concise statement of the issues as made by the pleadings:

The plaintiffs and the interveners allege they are five brothers, the heirs of a deceased brother, and the one sister of the defendant W. R. Matt; that their father and ancestor was Silas Matt; that March 26, 1886, said Silas Matt deeded to his only daughter, Mary A. Heuberger, over a half section of land owned by him in Boone county, Iowa; that said daughter, Mary A. Heuberger, took title to said land as trustee only for herself and her seven brothers, being then all the children of said Silas Matt, and subject to the life estate in said land of both the father, Silas Matt, and the mother, Marie A. Matt; that said trust was evidenced by a mortgage given back by the daughter, securing certain notes payable to certain brothers upon the death of the father and mother, and by an agreement in writing executed at the same time between herself and her father, by which the said daughter should hold the legal title to said premises, subject to a life use of the same during the natural life of both the father and mother, and two years after the death of the survivor then said daughter should sell said land, and, after paying said mortgage and after deducting the agreed amount for herself, divide the balance of the proceeds equally between her brothers and herself; that afterward the daughter, Mary A. Heuberger, having moved from Boone, Iowa, to California, it was arranged between said father and mother and said sons and daughter, by which the mortgage given by the daughter to her brothers was satisfied, her title to the land transferred by deed to her brother, W. R. Matt, a mortgage and notes given back by him to her and the other brothers, and by which the brother W. R. Matt was to hold title to the land only in the way and manner that the sister had title therein; that no money consideration was ever given or received for the deed from the father and mother to the daughter Mary A. Heuberger, nor for the deed from her to the brother W. R. Matt; that these notes secured by the mortgage given by W. R. Matt to his brothers and sister were not delivered until a long time after they were executed,

and until about the time W. R. Matt commenced to assert absolute title in himself to said premises; that the defendants now claim that said W. R. Matt holds absolute title in said premises subject only to the mortgage securing payment to four of his brothers and his one sister. The defendants admit the execution of the written instrument as alleged by the plaintiffs, except the contract between the father, Silas Matt, and the daughter, Mary A. Heuberger, made contemporaneous with the deed to her and mortgage given by her. They deny that W. R. Matt is holding the land in trust, but allege that he is the absolute owner of the same, allege that his brothers and sisters are barred by their own laches in now making claim to the land, and also barred by the statute of limitation.

It will be seen from the foregoing that the appellants contend for present equality in the distribution of the former estate of their ancestor, Silas Matt; whereas the appellee contends that the distribution of the estate was in legal effect accomplished by the instruments in question, and subject only to the conditions and contingencies specified in such instruments; that he thereby became absolute owner of the real estate, subject only to the burdens imposed and assumed by the instruments. That an arrangement such as is contended for by appellant would have been reasonable and equitable seems to us quite clear, and this is the strong point in appellant's case. The court would willingly reach such a result if the evidence fairly warranted it. On the other hand, there are other equities as will appear from the later discussion.

I. The first question which confronts us for determination is one of fact. Was there a trust agreement executed by Mary Heuberger at the time that she received the deed from her father substantially as contended by her in her testimony? No such an agreement was ever recorded, although the deed and mortgage were both recorded. No such paper was sent to Wm. R., the appellee, when she

1. TRUSTS:
evidence.

conveyed the premises to him. No reference was ever made to it in the correspondence. No one of the interested parties claim to have ever heard of it from Mary or from any one else until after the beginning of these suits. Would we be warranted, therefore, in finding affirmatively this fact upon the evidence of Mary alone? There are several considerations prominent in the record which satisfy us that we can not properly do so. The evidence of Mary on this question was all received over appropriate objections as to its competency and as to her competency as a witness under section 4604. We pass by the question thus presented. Giving to such evidence the fullest consideration to which it could be entitled, there is much in the record and in the undisputed circumstances to contradict it. Some months before the trial the deposition of this witness was taken on behalf of the appellants. She appeared in person, however, at the trial, and testified therein, so that her deposition was not used by the appellants. Portions of such deposition, however, were introduced in evidence by the appellee by way of impeaching her testimony upon the trial. Without going into details, it is sufficient to say that there is manifest inconsistency between her testimony and her former deposition upon very material points. Reading the two together, we can not avoid the conclusion that her testimony in both instances was based upon her conception of the just rights of the parties rather than on her actual recollection of facts. The papers in the transaction were prepared by an attorney of skill and reputation. If such an agreement as claimed was executed, no reason is apparent why it should not have been recorded with the deed and the mortgage. Nor is there any reason apparent why the mortgage and note should have been executed at all if such trust agreement was executed. The agreement as testified to by this witness would be quite inconsistent with the mortgage and notes. The beneficiaries named therein would become thereby the beneficial owners of the land.

And yet by the undisputed mortgage they became mortgagees of the same land, which, under the alleged agreement, they owned. In other words, such alleged agreement and such mortgage would be contradictory, and it would be impossible to construe them so as to give effect to both. This consideration greatly emphasizes our reluctance to find such an important fact upon the testimony of an interested witness as to a transaction had twenty-five years ago, and as to an instrument which she had not seen since the time of its alleged execution. It may be quite true that the witness has testified honestly to her understanding of the net result and effect of the papers executed. But if the instruments which were indisputably executed could be overturned by the mere general recollection of an interested witness, under such circumstances there would be but little security in the solemn execution and acknowledgment and recording of instruments defining the rights of parties thereto. It is our conclusion that the trial court properly found against the appellants on the question of fact at this point.

II. It is not claimed that any formal trust agreement was ever executed by the appellee other than the mortgage and notes hereinbefore referred to. The contention of appellants is that the appellee took the title from his sister Mary, burdened in the same manner as she had it, and that if she held it subject to a trust agreement, he therefore held it in like manner. The conclusion reached by us in the foregoing paragraph renders it unnecessary that we give further consideration to the effect upon appellee of such alleged trust agreement executed by Mary.

Referring now to the mortgage and notes executed by appellee, they purport to define the rights of the parties clearly and without ambiguity. By the terms of the mortgage the appellee did not bind himself beyond the valuation of the mortgaged land. This proviso is contained in

2. SAME: mortgage provisions: endorsement on notes: effect.

the body of the mortgage itself. The fact that the same proviso is contained in the form of an indorsement upon the back of the notes neither adds anything to the appellee's case nor takes anything from it. Some stress is laid in argument by appellants upon the alleged fact that some of these indorsements were not made until long after the deed and mortgage were made. As between the parties thereto, it was not material that they should be made at all. The proviso in the mortgage was all sufficient. These notes were used by some of the payees as collateral security for loans. For such purpose, it was eminently proper that such indorsement should appear upon the back of the notes as notice to indorsees. And this probably accounts for the fact that some of these indorsements appear in the handwriting of agents or clerks who held them as collateral. The indorsements as actually made are entirely consistent with the proviso in the body of the mortgage. They do not, therefore, impeach the title of the appellee in any sense, nor is the fact that the indorsements were not made upon the notes upon the date thereof available to the appellants as a circumstance of any significance.

III. On April 21, 1887, which was a few days before the execution of the mortgage by appellee, he wrote a letter to his brother George, known in the record as Exhibit G, which contained the following:

3. SAME: prior negotiations: evidence: notice. "Now youse all hold a noat of ten hundred dolers providing you can sell for 25 dolers an aker youse will all haf to gree to take more or less." Considerable stress is laid by appellant upon this expression, "more or less." The undoubted tendency of this expression is in support, of appellant's theory. But it is only a circumstance, and is clearly insufficient to overcome the effect of the formal instruments as finally executed. Appellants contend that they had no notice of the form of the mortgage. But the mortgage was on record, and its contents were available to them. The notes also came into the hands

of some of them and into the hands of the agents of others, and were so held for many years prior to the institution of this suit.

IV. There are other considerations which are quite insurmountable for the appellants. In 1909 the surviving widow brought an action against all her children to set aside the transaction, and to recover her distributive share in this real estate, alleging fraud on the part of the daughter and others in obtaining the conveyance from the husband and father. All the beneficiaries of the mortgage were named as parties defendant, but some of the nonresidents were not served with notice. Wm. R. Matt, the appellee, herein, appeared in such suit. He compromised the case with his mother. This was done with the consent and aid of the resident children. A written stipulation of settlement was entered into and filed in the case, both parties being represented by counsel. The mother quitclaimed to Wm. R. all her interest in the land. Wm. R. on his part paid his mother \$800 and undertook to pay her an annuity of \$450 a year as long as she lived, and quitclaimed to her all his interest in the homestead property wherein she lived in the city of Boone. The other resident heirs joined in the same quitclaim deed. In that case the mother had charged in her petition that Wm. R. was claiming to be the owner of the property, and such allegation was conceded by Wm. R. None of the children at that time raised any question as to Wm. R.'s rights to claim ownership of the property. Under his claim of ownership, he has expended substantial amounts in improvements on the place. That all the appellants had general knowledge of these facts and some of them had specific knowledge thereof is manifest from the record. Frank and James both joined in the quitclaim deed to the mother, in pursuance of the stipulation of settlement. Fred also joined in such quitclaim deed. It will be noted that Joe and Fred were not included among

4. SAME: action
to establish
a trust:
estoppel.

the beneficiaries of the mortgage. They were the two sons for whom the father had made considerable payments, and on whose account he had become financially involved. Prior to the bringing of this suit, each had made an affidavit in support of appellee's title, wherein each affiant disclosed his knowledge of the transaction had in 1887, whereby he was excluded from participation, and declared his satisfaction therewith. The affidavit on the part of Fred was made about the same time of the settlement with the mother. That on the part of Joe was made about three months before the beginning of this suit. Such affidavits were entirely inconsistent with the present attitude of such affiants as plaintiffs and appellants herein. They do not show any adequate explanation of such affidavits. When the two forty-acre tracts were sold in 1887, the entire proceeds were used by attorney Jordan in the payment of claims against the father. Some of these claims included debts of Frank and James. Charles D. died testate in 1890, as already stated. His will indicated no claim of interest in his father's estate except the ownership of the "\$1,000 note."

Notwithstanding the facts herein stated, the original petitions filed in this case charged fraud against Wm. R. in the sale of the tracts to Nelson and Adix, and prayed an accounting for the proceeds of such sale. The history of the pleadings in the case discloses much inconsistency in the contentions of the appellants. Originally, they charged fraud on the part of Mary in the first transaction. Later she joined them as an intervening plaintiff, and substituted petitions were filed. It was at this point that it was first claimed that a trust agreement had been executed by Mary. We would not lay too much stress upon such inconsistency. It is not unusual that very important facts come to the knowledge of counsel for the first time in the later developments of a case. Clients often fail to disclose facts to their counsel for want of perception of their importance. But

the inconsistency of position of the appellants is nevertheless a proper circumstance to be considered in viewing the testimony as a whole.

Looking at the situation of the parties as it was at the time of the execution of the instruments, it is evident that the arrangement was made upon the basis of a prospective value of \$25 an acre on the property, and on that basis the arrangement provided substantial equality between the six children. But it gave to the five mortgagees only a lien upon the land, and not an estate in it. The proviso in the mortgage was manifestly for the protection of the mortgagor. It was entirely natural. He went into the arrangement reluctantly. The land was not in fact worth \$25 an acre at the time the arrangement was made. The mortgagor was within his rights in insisting upon protection at this point. That a further proviso could have been made for the benefit of the mortgagees in case of increased valuation beyond \$25 an acre is, of course, clear. But such proviso was not made. It was not proposed nor considered. An increase of valuation beyond \$25 an acre does not appear to have been considered as probable. We are bound, therefore, to take the instruments as written and to give effect to them accordingly.

V. At the close of the evidence, the plaintiffs amended their pleading to conform to the evidence, and prayed that the various instruments introduced in evidence, including the warranty deed and the mortgage and the letter (Exhibit G) and the indorsement on the back of the note to Charles, be so reformed and construed so as to provide for an equal distribution of the proceeds of the farm when sold. What we have already said is quite decisive at this point also. There is no evidence of a mistake. To reform the contract would be simply to ignore it. The record does not warrant a finding that there was any contract other or different from that expressed in the writing.

S. REFORMATION
OF INSTRU-
MENTS: CON-
STRUCTIVE
TRUSTS:
EVIDENCE.

The theory of constructive trust is also urged by the appellants, but this is predicated upon the theory of fraudulent conduct on the part of Wm. R. The record does not warrant a finding to that effect. The sum of the situation is that the defendant holds his title by a warranty deed, plain, and unequivocal in its terms. Such deed is supported by abundant consideration in a legal sense. We can not treat such an instrument lightly. In order to find a constructive or resulting trust in such a case, the evidence must be clear and satisfactory. It has been said that the evidence in such a case must be "practically overwhelming." *Murphy v. Hanscome*, 76 Iowa, 192; *Parker v. Pierce*, 16 Iowa, 227; *Maroney v. Maroney*, 97 Iowa, 711; *Andrew v. Andrew*, 114 Iowa, 524; *Acker v. Priest*, 92 Iowa, 610; *Luckhart v. Luckhart*, 120 Iowa, 248; *Willis v. Robertson*, 121 Iowa, 380.

We hardly need to say that there is much incompetent testimony in the record, involving personal transactions with the deceased grantor. In view of our conclusions, we need not pass upon defendant's objection, and we will not attempt to separate the competent from the incompetent. Disregarding the incompetency, we are united in the conclusion that the rights of the parties are fixed by the terms of the written instruments. A fair construction of these instruments will not permit us to impress a trust upon appellee's title.

The decree entered below must therefore be—*Affirmed*.

C. A. ROBBINS, Appellant, v. J. P. STEELE.

Partnership: DISSOLUTION: OPTION TO REPURCHASE: CONSTRUCTION.

- 1 Plaintiff and defendant were law partners and plaintiff accepted defendant's proposition of dissolution on condition that defendant should fix a price on the firm property and business at which he would either buy or sell, and further that if plaintiff should elect to sell that he should have the right to repurchase the entire busi-

ness within a given time at the same price. *Held* that the price fixed by defendant for the sale related to a one-half interest in the business and property, and that plaintiff having elected to sell could not repurchase for the same amount he received, but should pay double that sum for the entire business.

Same : TRUSTS: BURDEN OF PROOF. The burden of proof is upon the member of a partnership who contends that he is entitled to become a joint owner of property purchased by the other member of the firm with his own funds, and which he has individually held and enjoyed until dissolution of the firm, to establish the trust.

Appeal from Madison District Court.—HON. J. H. APPLE-
GATE, JUDGE.

TUESDAY APRIL 2, 1912.

ACTION to enforce specific performance of a written contract for the sale and transfer to plaintiff of a law business with law library and office furniture and fixtures, and to enforce specific performance of an alleged oral contract to transfer to plaintiff certain bank stock, and, further, for an accounting of moneys received and expended in connection with the business of the law partnership. The lower court, after hearing the evidence, entered a decree for the defendant, and the plaintiff appeals.—*Affirmed.*

A. W. & Phil. R. Wilkinson and W. S. Cooper, and Sampson & Dillon for appellant.

John A. Guiher and A. C. Parker for appellee.

McCLAIN, C. J.—The parties to this suit on July 1, 1890, entered into a contract of copartnership for the practice of law in Winterset, Iowa, which was to continue for a period of three years, but which did in fact continue until September 21, 1905, when the defendant made a written proposition with reference to the dissolution of the partnership, as follows:

For the purpose of effecting a dissolution and making settlement of the affairs of the partnership business now and heretofore existing between us I submit the following proposition:

First Proposition: I will divide the property and business of the said firm in the following manner, viz.: A list and appraisement of the library, furniture and fixtures to be made showing the values of the different sets of text books and the different articles of furniture and fixtures each of us to take our share thereof; the first choice to be determined by lot and each of us to choose alternately until the whole of such property is equally divided. All accounts and notes belonging to the firm in matters where the business with the client is completed is to be divided equally between us. Cases and matters now pending to be completed by the two of us and the fees divided equally. Business on hand in which suits have not been commenced to be divided between us according to the clientage, that is all matters which have come to the firm by reason of Mr. Steele's connection therewith to be held by Mr. Steele, and all matters which have come to the firm by reason of Mr. Robbins' connection therewith to be held by Mr. Robbins. I am to retain the present offices which right is to be offset by the surrendering to you the representation in all commercial agencies in which the firm name of Steele & Robbins now appears and the business we now have on hand connected with the same and the foreign collections on hand. All the briefs prepared by Mr. Robbins to be retained by him and all the briefs prepared by Mr. Steele to be retained by him.

Second Proposition. If you do not wish to accept the first proposition I then make this second proposition: *I will put a price on the whole of the property and business of the firm, which price I will either give or take. If you shall elect to sell to me then you are to have the option to buy the same back within three years from this date at the same price I now pay you for the same plus seventy-five percent of the cost price of all additions made to the library and to the office furniture and fixtures. An inventory is to be made of the property now belonging to the firm and an account to be kept by me of the books, furniture and fixtures added to the property.*

Your option to buy back within three years from this date is to be exercised within ninety days after I shall notify you of my readiness to permit you to exercise the option and you shall have the right, without notice, to exercise the option at the end of the said three-year period.

In case you elect to buy or sell under this second proposition the sale is to be for cash. If you sell to me then and in that event as a part of the purchase price to you I will assume the payment of the Mrs. Collie note, the payment of the note negotiated to the Citizens' National Bank and cancel the indebtedness owing by you to me.

In case you shall elect to buy you are to pay off the Collie note and the said note at the Citizens' National Bank and pay or secure the one hundred dollars to me, and, in such case, you will turn over to me the earned fees of the firm of Steele & Robbins to provide against the debts and obligations of the said firm which earned fees I am to collect as speedily as possible, applying them to firm obligations and whatever is left to be divided equally between us.

This second proposition does not include fees already earned nor business which has heretofore been commenced nor business commenced for the Oct. term, 1905. All unfinished business is to be completed by the two of us as though no dissolution had occurred and the fees received therefor to be equally divided between us, or such unfinished business is to be divided as fairly as we can and each of the parties to finish the matter turned over to him.

These propositions are only good for today, and unless some basis of settlement is agreed upon to-day, I will take the necessary steps to dissolve our partnership. If you elect to divide the property under the first proposition we are to make the list and appraisement as provided in the first proposition tomorrow, the 21st day of September, A. D. 1905, and continue our labors in relation thereto until full settlement is made. If you conclude to accept the second proposition I am to be notified of such election by nine o'clock a. m. on the 21st day of September, A. D. 1905, and I will at once name to you a price which I am willing to give or take, and by noon of the 21st day of September, A. D. 1905, you are to determine whether you elect to buy or sell at such price and whether you buy or sell the matter to be immediately closed, settlement made

and the partnership dissolved. You election in this matter to be indorsed hereon.

On the next day the plaintiff wrote upon said proposition the following acceptance of the second branch of this proposition:

With the understanding that neither proposition prohibits the practice of law by either member of the firm and with the understanding that the second proposition is intended as now written above, I accept the second proposition to buy or sell; the price fixed by you to be indorsed hereon and this paper returned to me.

Thereupon the defendant indorsed the proposition and acceptance as follows: "I will give or take one thousand dollars on the conditions named in the foregoing instrument."

And on the same day plaintiff delivered to defendant his written election to sell his interest in the business to defendant in writing, as follows: "You are hereby notified that I elect to sell to you the law library and business as per terms already contained in our written propositions and a duplicate of this is indorsed on the proposition held by me."

The amount thus designated was paid by the defendant to the plaintiff, defendant remained in the old offices and continued the practice of the law, and plaintiff opened an office across the hall in the same building, and also engaged in the practice of the law. The business on hand at the time of dissolution was completed by the parties in accordance with their agreement. At the end of three years, plaintiff, desiring to exercise the option given in their contract to buy the whole of the business, library, furniture, etc., tendered to defendant the sum of \$1,000 on account of the business and the old library and furniture, and, in addition thereto, the sum of \$203 to cover additions which had been made to the library and furniture in the

meantime. Defendant refused to accept the tender, claiming that the price fixed by him was only the value of a half interest, and that plaintiff in exercising his option to repurchase should pay \$2,000, with an additional amount necessary to cover the additions to the library and furniture. There was no controversy as to the amount of the tender for the additions thus made. Plaintiff now seeks specific performance of the contract, contending that, on the payment of \$1,000 with the additional amount necessary to cover additions to the library and furniture, he is entitled to have transferred to him the entire business and the old library and furniture. Plaintiff proposes, however, if the court shall find that he is under obligation to pay \$2,000 for the entire business to exercise his right to repurchase under such finding, and therefore the sole question to be determined with reference to this branch of the case is whether under the terms of the contract plaintiff is bound to pay \$1,000 or \$2,000 for the entire business with the old library and furniture.

I. It is clear from the preceding statement that the ambiguity, if any, in the contract, is in the following provision of the second proposition made by the defendant, which was accepted by the plaintiff and acted upon by both parties, to wit: "I will put a price on the whole of the property and business of the firm, which price I will either give or take. If you shall elect to sell to me, then you are to have the option to buy the same back within three years from this date at the same price I now pay you for the same." It is to be noticed that the defendant undertakes to put a price on the whole of the property and business, which price he will either give or take. It is evident that it was not intended that either party was to pay to the other the value of the whole of the business in which they were jointly and equally interested, but that either was to pay to the other one-half the price fixed on the whole of the

1. PARTNERSHIP:
dissolution:
option to
repurchase:
construction.

property and business. There could have been no object in the buyer paying to the seller the entire price for the property and business of which they were joint owners, and receiving back one-half the amount as his proper share of the price of the whole property and business. If either one had been authorized to sell the whole of the property and business to a third party, of course the other would have been entitled to one-half of the amount received. Therefore it is clear that, when the defendant said, "I will give or take \$1,000 on the conditions named" in the instrument, and the plaintiff elected to sell on the terms proposed and received \$1,000 as full consideration for the transfer to defendant of his half interest, so that the defendant became the owner of the entire property and business, plaintiff impliedly agreed that the price of the whole property and business was \$2,000, and that in exercising the option to repurchase within three years "at the same price," which the defendant then paid, he did so with the obligation to pay to the defendant, who was then the owner of the entire property and business, the agreed price of \$2,000. Plaintiff was not exercising an option to rebuy the one-half interest which he had sold, but an option to rebuy his former half-interest and the defendant's former half interest. If plaintiff and defendant had been equal owners in common of a certain quantity of grain consisting of 10,000 bushels, and the plaintiff had sold his half interest to defendant for \$2,500 with a proposition to rebuy the entire quantity of grain within three months at the same price which he had received for his half interest, it could hardly be contended that the parties understood that the plaintiff was to have back the entire quantity of grain as his own, which had in the meantime become the sole property of the defendant, on the payment of the same amount which plaintiff had received for his half interest in the grain. Further elaboration would seem to be unnecessary, and we are clear that the only construction that can reasonably be put upon

the contract is that plaintiff, exercising his option to repurchase the entire property and business from the defendant, was under obligation to pay twice the amount which he had received for his half interest therein. In this respect the finding of the trial court was correct.

II. It appears that, soon after the formation of their partnership, the plaintiff and defendant entered into the possession of certain office rooms in a building belonging to the Citizens' National Bank. Subsequently, and during the continuance of the partnership an attorney who had formerly occupied such offices returned after an absence and obtained a lease from the bank of such offices to the exclusion of the partnership, and served notice to quit. The partnership moved across the hall into other offices, but, desiring to regain possession of the offices surrendered, the defendant, after consultation with the plaintiff, purchased certain shares of stock in the bank for the purpose of securing a controlling interest such as would enable him to induce the officers of the bank to again lease such offices to the firm. Such lease was made, and the partnership regained possession of the offices which they had surrendered. Plaintiff now insists that the stock purchased by the defendant became the joint property of the two partners, and that plaintiff is entitled to one-half interest in the bank stock on payment of one-half of the price paid by defendant for the stock. It would serve no useful purpose to set out in detail the evidence relating to this transaction. It is not contended that the partnership was to become the owner of the stock purchased by defendant; but plaintiff contends that, as between him and defendant, he is individually entitled to become the owner of one-half the stock which was purchased with the money of defendant and remained in his name as owner receiving dividends until the institution of this suit. The burden is on the plaintiff to establish the trust. We agree with the lower court that plaintiff has failed to maintain

2. SAME:
trusts:
burden of
proof.

this burden and approve the finding that plaintiff is not entitled to any interest in the bank stock purchased by the defendant.

III. Plaintiff in his petition sets out a number of items of fees alleged to have been received by defendant in the partnership business for which he has not accounted, and many items of money advanced by plaintiff for the partnership account which should have been charged to the firm. It appears from an elaborate finding made and filed by the trial judge that all these items have been considered by him and the balance of account as between the partners determined. Counsel for appellant do not refer to the judge's findings nor attempt to point out in what respects they are erroneous, but content themselves with general statements as to the items of their claims, referring to the evidence in the record. Of course, appellant is entitled to a hearing *de novo* on the record, but it would have been much easier to consider his case if counsel had taken account of the labor which the trial judge had expended upon it and pointed out specifically in what respects the findings were against the evidence. We have given particular attention to the larger items of the plaintiff's account, so far as they were disallowed by the trial court, and reach the conclusion that no different result could have been reached, and, on the whole record, we are satisfied that the decree of the lower court is in accordance with the evidence, and it is therefore sustained.

Appellant's motion to strike the additional abstract filed by appellee, which motion has been submitted with the case, is overruled.

The decree of the trial court is—*Affirmed.*

C. D. BOYNTON and CORA BOYNTON v. LUCY M. SALINGER,
et al, Appellants.

**Real property: CONTRACT BY HUSBAND AND WIFE: FORECLOSURE: JUDG-
I** **MENT.** Where a wife joined with the husband in a contract for the sale of land and in a suit to foreclose the contract, alleging that the only interest she had in the property was her inchoate right of dower, which was stipulated by the parties as a fact in the case, and she made no claim to any part of the amount due, judgment was properly rendered in favor of the husband for the full amount.

Same: NATURE OF JUDGMENT. The decree on foreclosure in such
2 case should allow the purchaser a stated time in which to pay the amount found due to the clerk, with direction that the same be not paid out until a proper deed was deposited with him, and if payment was not made within the time specified, special execution should issue.

Appeal from Carroll District Court.—HON. F. M. POWERS,
JUDGE.

SATURDAY, MAY 11, 1912.

SUIT to foreclose contract for the sale of land resulted in a decree as prayed though for a lesser amount. The defendants appeal.—*Affirmed.*

L. H. Salinger for appellants.

W. C. Saul, for appellees.

LADD, J.—The facts are quite fully stated in *Boynton v. Salinger*, 147 Iowa, 537, where the unpaid installments on the contract whereby Mrs. Salinger purchased certain real estate, except the last, were held to be barred by the

statute of limitations and the cause remanded for the purpose of allowing Mrs. Boynton to be made a party and the introduction of such further evidence as might be deemed essential to the complete adjustment of the rights of the parties. Upon remand, Cora B. Boynton filed her petition, alleging that she "joins with C. D. Boynton as party plaintiff in the foregoing petition, and for cause of action states that the only interest she has in and to lots nine (9) and ten (10) Carroll, Iowa, the property in controversy in said action, is her inchoate right of dower therein." She asked "judgment for the costs herein and for such other and further relief as may be equitable in the premises." The defendants thereupon admitted the allegations of the above petition, and pleaded thereto the original answer and amendment. Later they amended this answer by saying, in substance, that plaintiffs are not entitled to relief, and that the court was without jurisdiction for that the Supreme Court was without authority to remand an equity cause as was done. The plaintiffs joined in a reply closing with a prayer by C. D. Boynton for judgment on the \$1,000 installment last maturing, with interest. This prayer was later amended by praying as in the original petition.

On hearing the plaintiffs introduced in evidence a stipulation that "the contract sued on and in evidence is as follows" (setting out the contract), and "that the interest of Cora B. Boynton in said contract and in the real estate therein described is that of inchoate right of dower as the wife of C. D. Boynton, her coplaintiff in this action." This was tantamount to saying that she had no interest in the contract other than that arising from having an inchoate right of dower in the premises. Such is the meaning of the stipulation, or else it is meaningless, and, in either event, it negatives any present interest on her part in the contract. This being so, it is to be inferred that the payments therein promised belonged to C. D. Boynton,

and, as she joined him as party plaintiff in the action wherein he demanded judgment for the entire amount owing and she for none of it, and thereafter joined in a reply wherein he only sought relief, a decree was rightly entered as prayed. Counsel suggest that, as the stipulation concerning Mrs. Boynton's interest is in the present tense, she may have assigned any interest she had in the contract originally to another. This is disposed of by the fact that that instrument without assignment indorsed thereon or attached thereto was introduced in evidence constituting *prima facie* proof, in the absence of any showing to the contrary that the payees therein named were entitled to recover thereon, and, as her interest therein was stipulated to be that only arising from her status as wife, he was entitled to judgment for the amount due on the contract.—*Affirmed.*

SUPPLEMENTAL OPINION.

MONDAY, OCTOBER 21, 1912.

PER CURIAM.—The decree of the district court will be so far modified as to allow appellants 10 days from the filing hereof within which to pay into the hands of the clerk of the district court for the benefit of appellees or their representatives the amount payable under said decree, and if this is not done then special execution to issue as directed therein; but appellees or their representatives shall not withdraw said money so paid, or thereafter paid or made on execution, nor shall the clerk of said court pay over such money, until a deed conveying all title appellees had at the time of executing said contract of purchase, save that acquired thereunder by appellants, shall have been duly executed by appellees and their representatives to Lucy M. Salinger, and deposited with the said clerk of court for appellants.

x. SAME:
nature of
judgment.

With this modification, the opinion heretofore filed is approved, and the petition for rehearing overruled.

J. P. HERR, Administrator of the Estate of JOHN P. HERR, JR., Deceased, Appellant, v. J. A. GREEN.

Master and servant: NEGLIGENCE: EVIDENCE. In this action for the
1 death of an employee the evidence is held to require submission
of the question of defendant's negligence in ordering decedent to
work in a place of peril, in failing to warn him of the danger and
to provide suitable tools.

Same: CONTRIBUTORY NEGLIGENCE. An employee is not guilty of con-
2 tributory negligence in obeying the order of a superior, unless
in doing so the danger is so apparent that no ordinarily prudent
person would attempt it of his own volition. In this action the
evidence is held to present an issue for the jury as to the negli-
gence of decedent in obeying an order to loosen a rock at the
ledge of a quarry.

Appeal: REVIEWABLE QUESTION. The appellant court must determine
3 a case on the record as presented, it will not express an opinion
as to whether omitted facts would lead to a different conclusion.

Appeal from Jones District Court.—HON. F. O. ELLISON,
JUDGE.

THURSDAY, MAY 16, 1912.

ACTION for damages resulted in a directed verdict for
defendant and judgment thereon. The plaintiff appeals.—
Reversed.

*F. H. Randall, Barnes & Chamberlain, and Grimm
& Trewin, for appellant.*

Redmond & Stewart, for appellee.

LADD, J.—The plaintiff's decedent, John P. Herr, was employed in defendant's stone quarry and, after working there breaking and loading stone, drilling holes, and the like six or eight weeks, was directed on the 16th day of June, 1908, by the superintendent, acting as vice principal, to take a crowbar, go to the top of the quarry, and remove a rock. When doing so, the rock with stone near by fell and, carrying Herr down, crushed him to death. The petition alleged that he did not contribute thereto by his own fault and that defendant was negligent in directing the deceased, an inexperienced youth twenty-one years old, to do work which was very dangerous and which should have been done by an experienced quarry man, in not warning the deceased of the danger in connection with the work he was directed to do, in not stripping the rock back far enough so as to furnish deceased a proper and safe place to stand while doing the work, in directing the deceased to use a short crowbar for said work in the use of which it was necessary for the deceased to get close to the said loosened rock and earth and in a position of extreme danger.

At the close of plaintiff's evidence, a verdict on motion was directed for defendant, and the sole inquiry is whether the record was such that the issues ought to have gone to the jury. For this reason, the facts necessarily are recited at considerable length. The face of the quarry was nearly perpendicular and semicircular in form. From the surface to the bottom was about fifty feet, but ten or twelve feet of dirt was stripped before stone was reached, and this had been done fifty feet back. Three holes had been drilled down to the bottom twenty or twenty-five feet apart in February, 1909, and loaded with blasting powder. When these were fired, "the result left the rock hanging there, kicked out the bottom, kind of caved back, and left this hanging there as a shelf. It was nineteen feet from where this cave-off started to the top of the surface. Nothing was done with

I. MASTER AND
SERVANT:
negligence:
evidence.

hanging top until June 15th, when the holes were loaded over. The holes were reloaded by plugging up the bottom. Before they were plugged, you could see clear down through to the bottom."

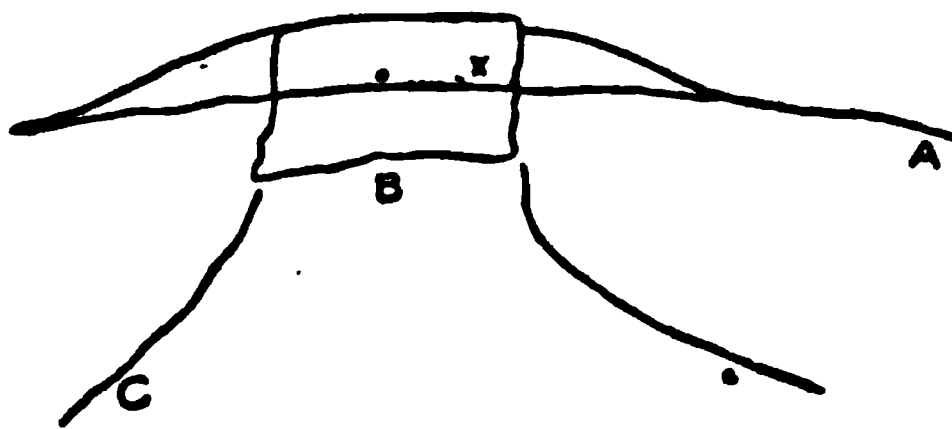
The defendant and Cook, whose testimony we have quoted, did this, and, when shot off, the explosion was out, the top heaving the rock up covering the surface several feet around, and shortly afterwards "the whole thing dropped right from the top, leaving a little ledge in front. In other words, this explosion blew up, breaking but a little on the top of the surface, and eight or ten minutes afterwards the surface for ten feet or more went down leaving a little bench in front, just a little bench across the top of the quarry, bound in from the two corners; was from one side to the other, nothing on the bottom at all and nothing over the top. The dimension of the ledge was eight or ten feet long and two feet thick, and I judge three feet wide, maybe more. The sides of the cliff were jagged like an explosion. Mr. Green wanted to know if it was dangerous for men to work under this bench. I said, 'yes.' He wanted to take it; he came up to take it—didn't have any man but Mike Shannon. I told him Mike Shannon was the man to come up and take it. He said they didn't have any men they could send up there; said they didn't hardly have a man to go up and get that down but Mike Shannon."

The rock extended across like a bridge, and back of it there was an open space of several inches. The defendant told the foreman to send a man up to assist him, and decedent was directed to do so. He took the necessary tools and with defendant undertook to prepare a place to stand, as the ground slanted upward from the rock at about half pitch, and decedent also "drilled a hole in the rock." The next morning Shannon fired two blasts in this hole without apparent effect. The superintendent Mittenberg then directed decedent who was breaking rock to take a

crowbar, go up and see what he could do with the rock; as testified by Coddling or as related by Mittenberg, the latter said, "Phil, you go up there, take your bar again, you work along there again, try your best, and now you look out." Decedent went up accordingly, and, as the superintendent testified, after working about a half hour, was cautioned by him from below, "Phil, now don't get too fresh up there," as he was getting near the edge, and Phil answered, "He know what he do." This witness also testified that defendant had called his attention to the stone and had said it was dangerous, but that the witness considered it safe back of the stone, that he "sent Phil up to try to get more opening on behind there to pry it down from behind" and told him, "You know, Phil, pretty near as good as I can tell you, you watch out," that he told him three times to be careful when he would step one foot "too far out," that he stood with one foot on the keystone and the other on the bank when the fall occurred, and this was dangerous, but he could have safely stood on the bank.

Coddling testified that decedent was "pretty well over the south side, standing there, when he got dropped. There had been a hole opened up behind there, could not stand on the bank; it was at the south side of the ledge. He stood facing the quarry. At the time the rock fell he was just standing there looking down to see what was going to be done, what to do with the rock in between the two arches there; then the lower one fell or dropped, and pretty soon the other went down. He was standing on the ledge pretty close to the top. From where I stood Herr appeared to be standing back from the front of the ledge so he wouldn't fall off in front, back pretty well, as far as he could handy, I suppose. I did not see him pry or loosen the rock at all. This big rock was apparently in two layers, pretty near the center, and pretty soon standing up there a short time the lower half fell—dropped; in two or three seconds the other half dropped on top of it. Q. Did that allow the

wing rock to fall—pull it over—too? A. Just as soon as the keyrock dropped they fell down, the two sides came down too. Q. State to the jury how much of the arch fell over to the sides of the bank? A. Back to here, both sides. Q. The top dropped, where he was standing—fell? A. Yes. Q. If he had been standing back two or three feet further, did enough of the rock fall so it would have taken him with it? A. That corner all came down, that edge, both corners came down when this rock fell. . . . Herr was standing where the cross (X) is, with a little bar in his hand, viewing the rock, as though looking to see, when the lower part dropped out. He went straight down feet first, and was killed, crushed with the rock that came down." This witness testified that the rock extended across like a bridge, and illustrated its location by a sketch:



The line A represents the face of the quarry; B, the rock, and C c the arch of stone supporting it, and X where the decedent stood immediately before falling.

Cook, after testifying to conditions after the blasts were fired on the 15th of June, proceeded: "Q. Now was there any place—state whether or not there was any space left, any place on this ledge to stand and work after this explosion? A. On the arch? Q. Yes. A. I would not think so. Q. Do you know whether there was or not? A. No; I wouldn't want to go out there myself. Q. Was there any place to stand and not stand on this arch? A. Yes, sir. Q. Where was it? A. The whole top of the quarry to stand on. Q. No other place, that is, between where the arch

joined onto the cliff and the cliff? A. Yes; the top of the cliff, a place there, cleaned off, would have had a place to stand."

There was evidence that the crowbar was not suitable for such purpose and that when the keystone fell several car load of rock fell with it, and also that decedent had, when about twelve or fourteen years of age, given signals to the engineer in hoisting rock in another quarry near which he lived six years and was waterboy for a time. The recital of facts leaves little or no doubt as to the dangerous character of the place. The explosions of blasting powder on the day before had left the rock hanging twenty or twenty-five feet above the bottom of the quarry as testified by one witness, or forty feet as estimated by another, and back of it the earth slanted upward five or six feet so steeply as to render it necessary to excavate in order to get a foothold. A hole in this rock had been twice charged and "shot off" shortly before decedent was ordered to "see what he could do with the rock." Cook, who had worked in the quarry ten years, testified that he had "never seen an arch pressing in this way; most generally is likely to shove off the top on operating the shot" at any time; and defendant seemed to think Shannon, who handled the powder and was of long experience, the only employee competent to remove the rock. The superintendent thought the place dangerous unless decedent remained away from the rock he was sent up to remove, which was difficult to do and accomplish what he was attempting. That it was a place of unusual peril, and that this was well known to Mittenberg, who was vice principal, in ordering decedent there to see what he could do about the rock, the jury might have found, and therefore that decedent's death was caused by defendant's negligence. See decisions hereafter cited.

So, too, the jury might have concluded that decedent was inexperienced in the kind of work required of him. He had been about another quarry as a boy twelve or

fourteen years of age carrying water and signaling the engineer when to hoist stone from the pit, but
2. SAME: contributory negligence. aside from this does not appear to have acquired greater knowledge than that which he must have obtained in breaking and loading stone and drilling holes during the six or eight weeks in the quarry of defendant. True, he said to the superintendent when employed that he could do whatever might be required, but this had reference to the usual work about the quarry and can not fairly be construed as relating to an extraordinary and unusual situation like that under consideration. Of course he is presumed to have understood generally the laws of gravitation and to have known that if he fell he would be injured and that in prying the stone he should avoid losing his balance when it fell. But he was not bound to know that when the stone fell it would likely carry with it the earth and stone several feet back as it did and take him along, even though standing as far back as he could in using a crowbar six or eight feet long. Moreover, he was impliedly assured by the order to go up there and see what he could do about the stone that this might be done safely, and for this reason his representative ought not to be denied a remedy against the defendant on the ground of contributory negligence unless the danger was so glaring that no prudent man would have entered into it even though not entirely free to choose.

The servant's duty is that of obedience, and when acting under an express order of the master or, what is the same, of one acting in his stead, he assumes no risk unless he fails to exercise ordinary care in obeying it. Whether decedent acted as an ordinarily prudent person would in a like situation was an issue of fact to be determined by the jury. *Hardy v. Railway*, 149 Iowa, 41; *Steele Co. v. Schymanowski*, 162 Ill. 447 (44 N. E. 876); *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573 (36 N. E. 572); *Shortel v. City of St. Joseph*, 104 Mo.

114 (16 S. W. 397, 24 Am. St. Rep. 317); *Stephens v. Railway*, 96 Mo. 207 (9 S. W. 589, 9 Am. St. Rep. 336); *Northern Pac. R. Co. v. Egeland*, 163 U. S. 93 (16 Sup. Ct. 975, 41 L. Ed. 82); *Cable v. Railway*, 122 N. C. 899 (29 S. E. 377); *City of Lebanon v. McCoy*, 12 Ind. App. 500 (40 N. E. 700); *East Tennessee, V. & G. R. Co. v. Bridges*, 92 Ga. 399 (17 S. E. 645); *Thompson v. Railway* (C. C.) 14 Fed. 565; 4 Thompson, Neg. section 3809.

We are of the opinion that the evidence was such as to carry the issue as to whether decedent was negligent in undertaking to obey Mittenberg's order, as well as whether defendant was negligent in that such order was given to the jury, and that the court erred in directing a verdict for the defendant.—*Reversed*.

SUPPLEMENTAL OPINION.

MONDAY, OCTOBER 21, 1912.

PER CURIAM.—Counsel in the petition for rehearing, as well as in oral argument, seem to have overlooked the fact that the decision in this case was necessarily based on abstracts filed with the clerk of this court. As to whether evidence omitted therefrom might have led to a different conclusion we express no opinion.—The petition is—*Overruled*.

3. APPEAL:
reviewable
question.

GLENDORA C. NUTTER v. DES MOINES LIFE INSURANCE
COMPANY, Appellant.

Insurance: CONTRACT BY INCOMPETENT: VALIDITY. Where an insurance contract gave to the assured several optional settlements, an exercise of either involving a knowledge of his rights and the effect upon him and those dependent upon him, a settlement thereunder was in itself a new contract and not merely the per-

formance of one already made, and was invalid if the assured at the time of making settlement was mentally incapable of exercising a deliberate judgment.

Same: AVOIDANCE OF CONTRACT: *status quo*. Where the parties can
2 be placed in *statu quo*, the contract of an insane person will be set aside, even though the other party did not know of the disability, and the entire transaction was fair and free from fraud. Thus where the policy was recognized as in full force, and cash settlement was made with the insured when mentally incompetent, the parties could be placed in *statu quo*, in a suit by the beneficiary, by deducting from the amount of the policy the sum paid in settlement and existing loans.

Same: EVIDENCE: REPRESENTATIONS OF INSURED. The purpose of the
3 statute requiring that all representations and warranties by the insured shall be attached to the policy is that all parts of the contract may be together and the insured may be in possession of the evidence of his contract; and a failure to do so precludes the insurer from pleading or proving any representations not so attached to the policy: So that where the insured made no representations in his original application concerning the use of liquor, the representation in an application for reinstatement that he was in good health and did not use alcoholic liquor to any greater extent than originally warranted was not admissible.

Same: SURRENDER OF POLICY: SUIT BY BENEFICIARY. The setting aside
4 of a contract of settlement and surrender of a policy of insurance, made by the insured when mentally incompetent, is not a prerequisite to an action on the policy by the beneficiary.

Insane persons: DISAFFIRMANCE OF CONTRACTS. The personal representative of an insane person may disaffirm and avoid his contracts.
5

Same: VERDICT: PASSION AND PREJUDICE. Where the evidence concerning the mental capacity of a person is such as to support a
6 finding of insufficient capacity to comprehend and appreciate the business in hand, a verdict to that effect will not be set aside on the ground of passion and prejudice.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
JUDGE.

TUESDAY, JUNE 25, 1912.

THE facts are stated in the opinion.—*Affirmed.*

Clinton L. Nourse and Casper Schenk, for appellant.

Bowen & Alberson, for appellee.

SHERWIN, J.—On the 21st day of September, 1900, the defendant issued an insurance policy on the life of Harry C. Nutter for \$1,000 payable in case of his death to the plaintiff as his beneficiary. This policy, No. 28,201, was issued in lieu of a policy, No. 12,244, which had been issued to said Nutter by this defendant in 1894, and which policy was canceled at the time of the issuance of policy No. 28,201 in September, 1900. In September, 1904, Nutter failed to pay the annual premium then due on his policy and was lapsed thirty days thereafter in accordance with the terms of the policy. In November, 1904, he applied in writing for reinstatement, in which application he warranted that he was in good health and that he did not use alcoholic or malt liquors to any greater extent than warranted in his original application for insurance. He was reinstated, and at the same time borrowed money of the defendant to pay the premium then due, and signed a loan agreement for the payment of this money. This amount became due September 21, 1905, and, under the written agreement between Nutter and the defendant, the defendant had the right to cancel the policy in the event of the failure of Nutter to pay the amount of the loan. This loan was not paid when it became due, and later Nutter borrowed an additional sum of the defendant, for which he executed his promissory note, which finally became due September 1, 1906. In August, 1906, Nutter applied to the defendant for the surrender of his policy, under the terms thereof, for its cash value, and about the 1st of September he did surrender said policy and receive from the defendant its cash value. Nutter died about the 17th day of September, 1906, and the plaintiff, his widow, thereafter brought this action at law to recover on the policy

so surrendered and canceled. There was a judgment for the plaintiff on the verdict of a jury, and the defendant appeals.

The surrender of the policy, under the circumstances narrated, was pleaded by the defendant and admitted by the plaintiff. But the plaintiff in reply thereto alleged that Harry C. Nutter was mentally incapable of making a valid surrender, and because thereof, that such attempted surrender was of no effect. The appellant contends that neither the negotiations for, nor the final surrender of, the policy, involved the making of a new contract; that all that it did amount to was the performance of a contract made by the assured and the company when the policy was issued in September, 1900, a time when the soundness of mind of Nutter was not questioned. And based upon this proposition, the defendant contends further that, where one party to a contract becomes insane during its performance, his insanity neither suspends nor annuls such contract.

We are of the opinion that the surrender of the policy involved more than the simple performance of a contract already entered into. The assured had an option, which only a sane mind could intelligently exercise. He was not bound to surrender his policy and receive its then value in lieu of the benefit that its continuance in operation might eventually bring to himself, or to his estate, or beneficiary. Under the terms of the policy, he had at that time the right to do either one of four things: First, to continue the policy for the full amount by paying the annual premiums provided for therein; second to borrow from the defendant company, at 6 percent interest, the loan value of the policy for that year; third, to surrender the policy and take a paid-up non-participating policy for the amount specified in the table of values attached to the policy; fourth, to surrender the policy and take the cash value according to the said table of values. The choice of rights under the policy involved

1. INSURANCE:
contract by
incompetent:
validity.

a knowledge of what those rights were, and what the consequence of his choice was, and the effect that it would have on him and on those dependent on him. The determination of these questions involved judgment, discretion, and selection, and we are of the opinion that the surrender of the policy would be invalid, if Nutter was at the time mentally incapable of understanding the entire matter of selection and of exercising the judgment and discretion necessary to constitute an intelligent act.

Appellant says, however, that if it be found that the surrender was a new contract, and that the assured was then of unsound mind, there can be no recovery, because the surrender, was fully executed in the ordinary course of business, was fair, reasonable, free from fraud, and the mental condition of the assured was not known to the defendant, and the parties can not be put in *statu quo*.

a. SAME: avoidance of contract: *status quo*.

Where the parties can be placed in *statu quo*, it is the rule in this state that the contract of an insane person will be set aside, notwithstanding the fact that the other contracting party may not have known of the disability, and that the entire transaction was fair and free from fraud. *Smartwood v. Chance*, 131 Iowa, 714; *Corbit v. Smith*, 7 Iowa, 60; *Behrens v. McKenzie*, 23 Iowa, 333; *Alexander v. Haskins*, 68 Iowa, 73.

Can the parties be placed in *statu quo*? We think so. If the plaintiff is entitled to recover at all, she can only recover the amount of the policy, less the amount that the assured had received thereon during his lifetime. The amount of the two loans and the surrender value of the policy paid to Nutter were deducted from the amount that would otherwise have been due on the policy. The claim of the appellant that, if the surrender had not been made, it still might have declared a forfeiture for nonpayment of the loan due September 21, 1905, and for that reason it can not be placed in *status quo*, does not seem to us to be

sound. It had the power, it is true, to declare a forfeiture for such nonpayment, but it also might waive such power and right, and that is what we think it did do. Although the loan was nearly a year overdue, no steps had been taken to cancel the policy. On the other hand, it was recognized as being in full force and effect, and, under such circumstances, we should not indulge the presumption that, had there been no surrender, a forfeiture would have been declared between the 4th and 17th days of September, 1906, and without such presumption there is nothing to indicate that the defendant is not placed in *status quo* by the judgment herein.

In his written application for reinstatement in 1904, the assured made the representations to which we have already referred, and further stated that he did not then and

3. SAME: would not thereafter use malt liquors or
evidence: other alcoholic beverages to any greater extent
representations than that warranted in his application
of insured.

for said policy. The evidence showed that, beginning some time in the year 1904, Nutter became an excessive, habitual user of intoxicating liquors, and that such condition continued until the time of his death. No representations or warranties were attached to the applications for either of the policies Nos. 12,244 and 28,201. The defendant offered in evidence the application made for reinstatement in 1904; but the court refused to receive it for the reason that no copy of the representations or warranties of the assured specific enough to meet the requirements of section 1819 of the Code was attached to the policy named, or to the certificate of renewal, and no defense could be interposed by the company on these grounds. As we have already seen, no representations or warranties were attached to either of the policies in question, and it is evident that the warranties contained in the exhibits offered herein are not specific enough to meet the requirements of section 1819. No specific representations or warranties were set forth in

the written application for reinstatement, or attached to the certificates of renewal. All that the assured stated on the subject was that he did not then in 1904, nor would he thereafter, use malt liquors or other alcoholic beverages to any greater extent than that warranted in his application for his original policy. The purpose of section 1819, as described by this court, is to require all representations and warranties to be attached to the policy so that all parts of the contract may be together, and that the assured may be at all times in possession of the evidence of his contract. *Johnson v. Insurance Co.*, 105 Iowa, 273. We think the exhibits were properly excluded.

Appellant further contends that this action at law can not be maintained until after the surrender of the policy and its cancellation have been set aside. Our own cases

4. SAME: surren-
der of policy:
suit by
beneficiary. cited by the appellant do not seem to reach or decide this question, and we know of none which hold that such an independent action must first be prosecuted to a successful termination.

There was a disaffirmance of the act of surrender by a party having capacity to disaffirm the acts of the deceased.

5. INSANE PER-
SONS: disaf-
firmance of
contracts. An insane person, acting through his guardian or personal representative, can disaffirm and avoid his contract. 2 Page on Contracts, section 899; *Whitcomb v. Hardy*, 73 Minn. 285 (76 N. W. 29); *Beasley v. Beasley*, 180 Ill. 163 (54 N. E. 187); *Louisville, etc., Ry. Co. v. Heer*, 135 Ind. 591 (35 N. E. 556).

Finally, it is said that the verdict is the result of passion and prejudice, and should not be allowed to stand. Were the writer hereof called upon to determine from the

6. SAME: ver-
dict: passion
and preju-
dice. evidence presented in the record whether the assured was, at the time of surrendering the policy, mentally incapable of so doing, there would be no hesitancy in determining that he knew precisely what he was doing. But there was a conflict in

the evidence as to whether the mental faculties of the assured had been so seriously impaired by the use of intoxicating liquors as to render him incapable of understanding and appreciating the business he then had in hand, and we are agreed that there is sufficient evidence, showing mental unsoundness at that time, to take the case to the jury. We can not say, therefore, that the verdict is the result of passion or prejudice.

We reach the conclusion that the judgment must be affirmed, and it is so ordered. See *Searles v. Life Ins. Co.*, 148 Iowa, 65.—*Affirmed.*

LUCINDA HUSTED, ANNA B. ALLEN and THOMAS D. FOSTER,
Appellees, v. CALEB ROLLINS, WM. PLEASANT ROLLINS, et al., Appellants.

Estates of decedents: DESCENT AND DISTRIBUTION. Upon the death
1 of a wife intestate, leaving children by a former marriage surviving her, but without issue as the fruit of her second marriage, her second husband surviving her would take only a one-third interest in her separate estate, which upon his death would descend to his heirs.

Conveyances: CONSTRUCTION: WORDS OF INHERITANCE. While under
2 the statutes technical words of inheritance are not necessary to constitute an estate in fee, or to create an estate of inheritance, still they may be important in determining whether a fee is conveyed.

Same: *Habendum* CLAUSE. The object of a *habendum* clause in a
3 deed is to define the grantee's estate; and while at common law it was the general rule that it might be resorted to to explain, enlarge or qualify the estate but not to defeat it, the modern rule adopted in this state is to construe the whole instrument without reference to formal divisions, so as to effectuate if possible the grantor's intent.

Same: GRANTEE NAMED IN *habendum* ONLY. A grantee named for the
4 first time in the *habendum* clause may acquire the remainder by a fee title, the grantees named in the preceding portion of the instrument taking only a life estate.

Homestead: ELECTION. Where the husband had the right to occupy 5 premises for life and the interest of his wife in other property terminated with her death, his election to take a homestead in the other property made under a mistaken belief as to her title, did not prejudice his rights in any property acquired by the wife during marriage, or that of his heirs upon his death.

Appeal from Madison District Court.—HON. W. H. FAHEY,
JUDGE.

SATURDAY, SEPTEMBER 21, 1912.

ACTION for the partition of real estate from a decree establishing the interests of the various parties and ordering a sale of the property, all parties appeal. As defendant Wm. Pleasant Rollins first perfected his appeal, he will be called appellant. *Reversed* on defendants' appeal. *Affirmed* on plaintiffs' appeal.

J. P. Steele, for appellants.

W. S. Cooper, for appellees.

DEEMER, J.—Three separate and distinct tracts of land are involved in this appeal: One consisting of thirteen and one-half acres of land, known as tract "A"; another, consisting of twelve and one-half acres, known as tract "B"; and a third, consisting of seven and one-half acres, known as tract "C." Plaintiffs are the sole and only heirs of N. J. (or Jane) Rollins, now deceased, children by a former husband, Thos. Foster, who died December 29, 1870. N. J. Rollins died in September of the year 1910, and at the time of her death she was the wife of Caleb Rollins. No children resulted from this last marriage, and after the commencement of this suit, which was brought against Caleb Rollins alone, he died, and by supplemental petition his heirs were brought into the case and made parties de-

fendant. Plaintiffs claim that at the time of the death of N. J. Rollins she was the owner in fee of tract A, the owner of an undivided one-half of tract B, her husband Caleb being the owner of the other one-half, and that N. J. Rollins had a life estate in tract C the fee of which had been conveyed to her first husband, Thos. Foster, in the year 1870. In virtue of the ownership of tract C, they claim that Caleb Rollins never had any interest therein. They admitted that Caleb Rollins as surviving husband was entitled to one-third of tract A. They also admitted that Caleb Rollins was the owner of an undivided one-half of tract B, and also one-third of the other half as surviving spouse; but, as already stated, they denied that Rollins had any interest in tract C. During his lifetime Caleb Rollins filed an answer to this petition in which he admitted the allegations as to tract A, but denied the allegations as to tract B. As to this latter tract he averred that N. J. Rollins had no interest therein but a life estate, and that he himself had none other than a life estate; the fee being in William Pleasant Rollins. As to tract C he denied that the property was ever conveyed to Thos. Foster. He averred that these lands were conveyed by quitclaim deed to N. J. Rollins in the year 1887, and that they were occupied by himself and his wife, the grantee, from that time until her death as their homestead. In virtue of these facts he claimed that he was entitled to either one-third of tract C in fee or to occupy the same during life as his homestead. We here quote this further allegation from his answer:

That this defendant and Jane Rollins as husband and wife adversely and peaceably occupied said land for more than twenty years, under color of title, as and for their homestead, and this defendant is now occupying said land as his homestead, and here and now and hereby elects to occupy said land, designated as tract C, as and for his homestead during the remainder of his life.

William Pleasant Rollins, who was made a party de-

fendant, filed an answer in which he claimed title to the whole of tract B subject to a life estate in his father under and in virtue of a deed from his grandfather, Pleasant Rollins, of date December .21, 1894. The material parts of the deed under which he claims are as follows:

I, Pleasant Rollins (unmarried), of the county of Madison and state of Iowa, in consideration of the sum of one hundred dollars, in hand paid by Caleb Rollins and N. J. Rollins of Madison county, do hereby sell and convey unto the said Caleb Rollins and N. J. Rollins, the following described premises, situated in the county of Madison and state of Iowa, to wit: (Land designated as tract B described). And I hereby covenant with the said Caleb Rollins and N. J. Rollins that I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever. And I covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. This deed is to take effect at the death of Pleasant Rollins, and then Caleb Rollins and N. J. Rollins to have it their lifetime, and then it falls to William Pleasant Rollins.

This deed was signed in the presence of two witnesses and was acknowledged on the day it was made. William P. Rollins asked that his estate therein be quieted subject to the life estate in his father, Caleb.

It should be stated in this connection that Pleasant Rollins, the grantor in this deed, died many years ago. So the issues stood until the death of Caleb Rollins, when plaintiffs filed an amended and supplemental petition in which they set forth the death of Caleb Rollins and in lieu of the allegations of the original petition stated, with reference to tract B, that Caleb and N. J. Rollins were each the owner of an undivided one-half thereof down until the death of N. J. and that upon her death Caleb, instead of taking his distributive share of his deceased wife's estate, elected to use and occupy the same for life as part

of the homestead of himself and wife, and they averred that they, as the heirs of N. J. Rollins, were each entitled to an undivided one-sixth of all the land in tract B, and the substituted defendants, the heirs of Caleb Rollins deceased, three in number, were each entitled to an undivided one-sixth. They further averred that in virtue of the election made by Caleb Rollins during his lifetime, both by conduct and in the answer filed by him, plaintiffs were the owners and entitled to the whole of tract A. The substituted defendants in their answer admitted that upon the death of N. J. Rollins plaintiffs each became the owners of an undivided two-ninths of the land in tract A, but averred that they had no interest in tract B, averring that the title was in William Pleasant Rollins, but further claiming that if Caleb Rollins had any interest in this land they were each entitled to an undivided one-sixth thereof. As to tract C, they averred that N. J. Rollins during her lifetime elected to occupy the same as her homestead after the death of her first husband, but further stated that on the death of N. J. Rollins each of the plaintiffs, three in number, became the owner of an undivided one-third of tract C. They each and all denied any election by Caleb Rollins during his lifetime to take a homestead in tract C in lieu of his distributive share. William Pleasant Rollins, in his answer to the supplemental petition, adhered to his claim of title to tract B, and denied that his father, Caleb, had made any election which deprived him of his right to take distributive share, and as an heir of Caleb he claimed a one-ninth interest in tract A. On these issues and the testimony adduced in support thereof the trial court rendered a decree finding that N. J. Rollins died seised of tract A and was also the owner in fee of a one-half interest in tract B, and that she also had the right during her natural life to occupy the tract known as C. Other findings were made, and on the strength thereof the title to tract C was found to be in plaintiffs, and each was awarded

an undivided one-third interest therein. They were each awarded a two-ninths interest in tract A, and defendants were each given a one-ninth thereof. And plaintiffs were each awarded a one-ninth interest in tract B, and each of defendants was given a two-ninths interest therein. Defendant William Pleasant Rollins appealed from this decree, as also did all the plaintiffs from that part of it which gave them but one-ninth instead of one-sixth of tract B.

We shall first consider the appeal of defendant Rollins. He insists that he became the owner in fee of tract B in virtue of the deed which we have heretofore set out. He

also claims that, as tract A was purchased by N. J. Rollins after her marriage to Caleb, each of the defendants should have been given a one-sixth of that tract, or in all one-half of it on the theory, as we understand it, that N. J. Rollins died without issue. The second of these contentions is without merit. It is true that Mrs. Rollins did not acquire the title to tract A until after her marriage; but when she died she was without issue, for plaintiffs were her legal heirs although not the heirs of her husband. Her husband, Caleb, therefore could not have taken one-half of her estate. At most, he was entitled to one-third, and, he having departed this life, his heirs, three in number, would on the face of it each be entitled to but one-third of one-third, or one-ninth, Code, sections 3378, 3379.

The other proposition is more difficult of solution. It is claimed for this appellant that under the deed which we have set out, he became the owner in fee of tract B,

in virtue of what is denominated the *habendum* clause, reading as follows: "This deed to take effect at the death of Pleasant Rollins, and then Caleb Rollins and N. J. Rollins to have it their lifetime, and then it falls to William Pleasant Rollins." No claim is made that the instrument is testamentary in character. and, as all the parties treat it as a deed con-

1. ESTATES OF
DECEDENTS:
descent and
distribution.

2. CONVEYANCES:
construction:
words of
inheritance.

veying present interest taking effect not later than the death of the grantor, we shall so consider it. Were it not for this final cause, there could be no doubt that it conveyed an estate in fee simple to the grantees named. True the word "heirs" does not appear in the granting clause, but this is not essential under our law. Section 2913 provides that the term "heirs or other technical words of inheritance are not necessary to create and convey an estate in fee simple." It is also provided in section 2914: "Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used."

While it is true, of course, under these statutes, that words of inheritance are not necessary to create an estate of inheritance, and that it will be presumed every conveyance of real estate passes all the interest of the grantor therein unless a contrary intent can reasonably be inferred from the terms used, it is nevertheless true that the absence of words of inheritance may be full of significance, for the law does not say in express terms that every conveyance where these words are omitted shall create an estate in fee simple. As we view it, section 2914 of the Code has no application here; for the reason that, no matter what construction be put upon the deed, it is conceded that it passed all the grantor's estate. The real question is: Who took under the deed, and what is the nature of the estate conveyed? Section 2913 is important; but, as already suggested, it does no more than to supply by implication or presumption the word heirs or other equivalent terms. Recognizing this rule, appellees contend that the last clause is in the nature of a *habendum*, and, as it is repugnant to the estate granted in the granting clause, it is void. Something is said in argument to the effect that it is a restraint on alienation; but this is not true as we view it. Whether it grants a life estate or a fee to Caleb and N. J. Rollins, there is nothing in the *habendum* which places any

restraint upon their power to sell whatever estate they may have. In this respect the case differs from *Tenny v. Mains*, 113 Iowa, 53; *McCleary v. Ellis*, 54 Iowa, 311; *Case v. Dwire*, 60 Iowa, 442, and other like cases relied upon by appellee. *Case v. Dwire* is nearest in point; but in that case the conveyance was either of a fee simple absolute, or of a base or determinable fee, and the court expressly held that, as there was no particular estate, there could be no remainder, for there was no estate upon which a remainder could rest. It was also suggested that if the only question to be considered was, what parties took the estate under devises passing title, a different question would arise.

Under the common law, and indeed under all statutes with which we are familiar, the object of a *habendum* clause is to define the grantee's estate. But it was also true that if the premises, meaning all that part of the deed which went before the *habendum*, granted an estate in fee simple as "to the grantee and his heirs" or "to the grantee, his heirs and assigns," the estate conveyed was in fee simple, although there was no *habendum*. Again, under the same law, if the granting clause was either silent or ambiguous as to the estate intended to be conveyed, the *habendum* was resorted to in order to ascertain the nature of the estate. At common law the rule quite generally announced was that while the *habendum* might be resorted to to explain, enlarge, or qualify the estate granted, it would not be allowed to contradict or defeat the estate granted in the premises. At common law, if the word "heirs" or its equivalent was not used, the grantee took a life estate only by implication; but here the presumption might be enlarged or qualified by the *habendum* clause. But if the premises expressly granted an estate in fee, the conveyance could not be wholly annulled by anything in the *habendum*. *Kelly v. Hill* (Md.) 25 Atl. 919; *Breed v. Osborne*, 113 Mass. 318;

3. SAME:
habendum
clause.

Faivre v. Daley, 93 Cal. 664 (29 Pac. 256); *Karchner v. Hoy*, 151 Pa. 383 (25 Atl. 20).

Notwithstanding these somewhat arbitrary rules, common-law courts have almost universally given effect to both the granting clause and the *habendum* whenever it was possible to do so by fair construction. *Thompson v. Carl*, 51 Vt. 408; *Rowland v. Rowland*, 93 N. C. 220; *Tyler v. Moore*, 42 Pa. 374; *Jamaica Pond v. Chandler*, 9 Allen (Mass.) 159. Again, if the estate is briefly defined in the premises and more specifically in the *habendum*, the latter will control, for that is its office. *Karchner v. Hoy*, 151 Pa. 383 (25 Atl. 20); *Doren v. Gillum*, 136 Ind. 134 (35 N. E. 1101). The modern rule, and the one we have adopted, is to construe the whole instrument without reference to the formal divisions in order to effectuate, if possible, the grantor's intent. *Beedy v. Finney*, 118 Iowa, 276. That decision fully reviews the authorities, and we need only quote therefrom as follows:

Where, however the premises purport to convey without qualification or description, there can be nothing inconsistent with it in the *habendum* declaring the character or quality of the thing transferred, for that is not elsewhere defined. The repugnancy, to defeat the *habendum*, must be such that the intention of the parties either can not be ascertained from the whole instrument, or, if ascertained, can not be carried into effect. If, from the entire instrument and attending circumstances, it appears that the grantor intended to enlarge, restrict, or even repugn the conveyancing clause, the *habendum* will control. It is then to be regarded as an *addendum* or *proviso* to the granting clause, which will control it even to the extent of destroying its effect. In short, the modern rule requires the consideration of the deed as a whole, and not in separate and distinct parts, as was formerly done, and the finding of repugnancy avoided whenever all the provisions of the instrument may, without ignoring the accepted canons of construction, be given force and carried into effect. . . . The estate may be limited in the *habendum*, although not mentioned in the premises of a deed, and without the

use of the word 'remainder.' . . . And the latter part of a deed has been allowed to control, and render what seemed to be a fee, a life estate in the first taker. *Prior v. Quackenbush*, 29 Ind. 475.

In view of this our latest pronouncement upon the subject, our path seems reasonably clear, for there can be no reasonable doubt as to the grantor's intent in making the deed. He evidently did not intend to pass the fee to the parties named as grantees in the premises. The only remaining doubt is: Did he convey the remainder to William Pleasant Rollins? Had Rollins been named in the granting clause, there would be no doubt here. But his name appears only in the *habendum*. The inquiry naturally arises: Is he entitled to take the remainder in fee under this *habendum*? Of course, if no grantee is named in the premises, the grantee named in the *habendum* takes the estate. *Sumner v. Williams*, 8 Mass. 162 (5 Am. Dec. 83); *Irwin's Heirs v. Longworth*, 20 Ohio, 581. And if two or more are named in the premises and one only in the *habendum*, he alone will take. See cases just cited. We also find that under the strict rules of the common law a remainder may be declared in the *habendum* to one not mentioned in the premises. *McCulloch v. Holmes*, 111 Mo. 445 (19 S. W. 1096); *Farrar v. Christy's Adm'rs*, 24 Mo. 453; *McLeod v. Tarrant*, 39 S. C. 271 (17 S. E. 775, 20 L. R. A. 846).

While there is some conflict in the cases where a new grantee of a present estate is first introduced in the *habendum*, the universal holding seems to be in accord with the rule already stated where the *habendum* gives an estate in remainder to the person whose name is there for the first time introduced. *Blair v. Osborne*, 84 N. C. 417; *Shep. Touch*, 151; *Berry v. Billings*, 44 Me. 416 (69 Am. Dec. 107); 3 Wash. on Real Prop. (5th Ed.) page 468.

It follows from what we have said that William Pleasant Rollins took an estate in remainder under this

4. SAME: grantees named in *habendum* only.

deed and that as the prior estates have now terminated, he has an estate in fee simple absolute.

II. As to plaintiff's appeal: The only points presented here are that, as Rollins elected to take a homestead in the lands known as tract C, which we have already referred to, he waived his distributive share, and none of the defendants are entitled to anything out of tracts A and B. Under the construction we placed upon the deed to tract B, Caleb Rollins had the right to occupy that property during his natural life. He got nothing from his wife under any election as to tract C, for her interest terminated with her death, and plaintiffs took title to the entire tract as heirs of their father. As he obtained nothing from her, there surely was no election on his part, and, if he was mistaken as to her title or his own at the time he filed his answer, this mistake should not prejudice either him or his heirs who have the same rights in the property as he would have had had he lived. He had the right to hold the property during his wife's life as his homestead, and he received nothing under his election, even conceding that he had one.

The finding of the trial court as to interests of the respective parties in tracts A and C seems to be correct. It follows that on the appeal of defendant Rollins the decree must be reversed, and on plaintiff's appeal affirmed. Appellant will pay one-fourth and plaintiffs three-fourths of the costs of this appeal.

On Rollins' appeal—*Reversed*. On plaintiffs' appeal—*Affirmed*.

JOHN MILLER, MORRIS S. MILLER, CHARLES W. STAFFORD
and JACOB DRYFUS, Appellees, v. HAWKEYE GOLD
DREDGING COMPANY, LTD., C. H. KURTZ, E. C. CLARK,
E. W. DINGWELL, A. C. CLARK, H. D. OVERHOLTZ
and GEORGE T. HEDGES, Appellants.

Parties: MISJOINDER AS PLAINTIFFS. The statute providing that all
1 parties having an interest in the subject of an action and in the
relief demanded may be joined as plaintiffs, unless it is otherwise
provided, is designed to apply to all actions the rules which form-
erly obtained in chancery practice; but they must have a common
interest in the cause of action and the relief sought, it is not
sufficient that they each have a right of action growing out of
the same transaction if the relief sought by each be distinct and
unconnected. Hence in an action by several persons against a
corporation and its directors to impress a lien upon an alleged
trust fund, where no one plaintiff was interested in the cause
of action or relief demanded by others, it was error not to re-
quire an election of the particular plaintiff in whose name the
action should be prosecuted and a dismissal as to all others.

Actions: TRANSFER OF CAUSES: HARMLESS ERROR. Refusal to transfer
2 an action demanding only a money judgment to the equity side
of the docket was harmless error, where by a subsequent amend-
ment to the petition an equitable cause of action was pleaded and
equitable relief demanded.

Corporations: PAYMENT FOR STOCK: CONVERSION: RIGHTS OF STOCK-
3 HOLDERS. A shareholder is not by virtue of that fact alone a
corporate creditor, and he has no distinct right to any of the
corporate property; but the corporation may become indebted to
him the same as to a stranger: So that where the corporation
refused to apply money tendered in payment of stock subscrip-
tions to that purpose, but accepted and retained the same, con-
verting it to its own use, its liability was the same as for the
conversion of the property of a stranger.

Same: RIGHTS OF STOCKHOLDERS: INJUNCTION. Stockholders seeking
4 to establish a lien on funds of the corporation are not entitled
to a temporary injunction restraining the corporation from other-
wise disbursing the fund, where there is no allegation of insolvency
and they are only entitled to a money judgment.

Appeal from Linn District Court.—HON. MILO P. SMITH,
JUDGE.

FRIDAY, SEPTEMBER, 27, 1912.

FROM a decree declaring certain sums owing plaintiffs, and establishing liens on an alleged trust fund on deposit with the Cedar Rapids National Bank and ordering payment therefrom, the defendants appeal—*Reversed*.

Crissman, Linville & Churchill and Dawley & Wheeler,
for appellants.

Grimm & Trewin, for appellees.

LADD, J.—The Fraser river, having its source near the headwaters of the Yukon, flows south into the Straits leading to the Pacific Ocean. For many years the Indians washed gold from the debris along its shores. Citizens of this state laboring under the delusion that doing so by machinery would prove feasible, as well as profitable, organized a corporation, known as the Iowa Lillooet Mining Company, Limited, under the laws of British Columbia, with its principal place of business at Lillooet, B. C., and through it launched on the river a dredge boat equipped with machinery, with the design of acquiring the gold which they had imagined had been accumulating beneath its waters for centuries. This was in 1903, and, as rumors of treasures to be found reached Iowa from afar off, greed of gain grew, and another company, the Hawkeye Gold Dredging Company, Limited, was promoted to take care of the gold at the bottom of some unappropriated portion of the stream. Though Lillooet was named in the articles of each company as the principal place of business, this was in fact at the office of B. B. Bliss, secretary of both companies, in Iowa Falls. In anticipation of what might

happen, the stock in the company first organized rapidly advanced in market value, and, as a consequence the shares of capital stock in that being promoted, were sold, as it were, in a day, and not until all were gone was it realized that some who had parted with their money to exploit the first enterprise had not been afforded an opportunity to participate in the last. It is said, by more than one witness, that the people of Charles City were clamorous for stock, and owing to profound sympathy for them, Mrs. Hamilton, stenographer of the secretary and designated on the prospectus as assistant treasurer of the company, telephoned to John T. Bailey, then at Iowa City, that it would be to his advantage to come to Iowa Falls. Upon arrival, he found her in charge of the office, Bliss and others having gone to British Columbia to formally organize the company, and the "advantage" to Bailey suggested was that he dispose of stock to the aforesaid people of Charles City. After considerable parley, it was arranged that the shares should be sold at fifteen cents each, of which Bailey should retain two cents as commission, remit three cents to Mrs. Hamilton, and whatever more was paid (the par value being ten cents per share) should be turned over to the company. She claimed that these shares were some for which others had subscribed; and one controversy is as to whether the purchasers were to be regarded as original subscribers, and therefore required to pay but twenty-five percent of the par value in cash and the remainder in five equal monthly installments, or were taking the shares from original subscribers, who had paid in part or wholly therefor, and were to pay in full and stand in the place and stead of their predecessors.

The evidence bearing on the issue was in sharp conflict, and was such that, had the cause been submitted to the jury, we could not have interfered with the verdict returned. Many persons at Charles City either subscribed for or purchased stock through Bailey, as did the plain-

tiffs, John Miller, 20,000 shares, Jacob Dreyfus, 3,500 shares, M. S. Miller, 1,500 shares, and Charles W. Stafford, 1,000 shares. The subscriptions of each of these persons were separate, and each paid twenty-five percent of the par value and received a separate receipt therefor, signed by "B. B. Bliss, Secretary Hawkeye Gold Dredging Co., Limited, per M. V. H." (Mrs. Hamilton.) A few days later the remaining seventy-five percent of the par value of their stock was remitted through John Miller and similar receipts issued.

As we understand the record, incorporation was effected under the laws of British Columbia, May 19, 1904, and the incorporators met in Iowa Falls June 22d thereafter and elected directors, and on the same day the directors selected officers of the company. On the next day a committee to obtain information with respect to a contract for dredging and report, and to act when directors were not in session, was appointed. The stockholders met August 24 and adjourned until August 30, 1904, when a resolution was adopted, proposing to acquire a certain mining lease from four stockholders in consideration of 1,600,000 shares of stock and \$10,000 in money. It was also ordered that subscriptions on which there had been no payment be vacated, and resolved that "no money be paid out and no expenses be incurred, except the ordinary clerk hire, postage, stationery, and necessary incidental expenses, until it shall be demonstrated to the satisfaction of our board of directors that the dredge now in operation by the Iowa Lillooet Gold Mining Company has proven its ability to earn substantial dividends on the stock of said company, in which event our board of directors shall submit plans and specifications for the building of dredges to a meeting of the stockholders of this company for authorization by such stockholders' meeting to enter into contract for the building of such dredges." "Also that a special meeting of the stockholders be held Dec. 1,

1904, at which meeting, if it shall appear that the dredge operated and owned by the Iowa Lillooet Company has not earned substantial dividends on the stock of said company, and that it has not proven a financial success, we favor taking provision at such meeting as shall return the money held by this company to the stockholders, less the incidental expenses heretofore referred to."

Up to this time no stock had been issued. No action had been taken, save as above stated, recognizing any one as stockholder, and, though the minutes of the meetings refer to those present as stockholders, they held no evidence in the way of certificates showing them to be such. The directors elected at the meeting last mentioned met August 10, 1904, and, after electing officers, a counterproposition for the acquirement of the mining lease was accepted; and it was ordered that there "be issued to all subscribers of stock a stock certificate on the form now printed, signed by the president or vice-president and countersigned by the secretary, with seal of the company attached," the stock certificates and the record to indicate the amount paid thereon. The directors also resolved that "in pursuance to the recommendation of the stockholders all original subscribers who have paid on their stock in excess of the twenty-five percent assessment be returned all amounts in excess of twenty-five percent."

On September 24th following another meeting was had, at which the office of secretary was declared vacant and resolution to refund was suspended and W. L. Crissman appointed attorney for the company. All books and papers of the company which had not previously been destroyed were removed to the office of Crissman & Sargent at Cedar Rapids, upon the discovery by the attorney of derelictions on the part of the secretary and treasurer. On December 1, 1904, the board of directors, in pursuance of the articles, appointed a committee of three, including Mr. Crissman, as an executive committee, with full power to act in behalf

of the company in all matters, and by direction of this committee all payments above twenty-five percent of the par value of stock originally subscribed were refunded, save to plaintiffs. Mr. Crissman, in a report to the directors on January 20, 1905, stated that the claims of plaintiffs required special consideration, and explained in his testimony that "the theory of that was that we were convinced, the board of directors were convinced, and the executive committee were convinced, that these people to whom refund was made had paid in the amount in excess of twenty-five percent innocently, and under a misapprehension of the requirements of the company. I learned that the men who had sold the stock had made representations to them in regard to how the balance over and above the twenty-five percent would become payable. Some of them were paying in fifteen percent a month, and others had been told that it would have to be paid in so many months, and they had never been advised to the contrary. It had usually been remitted by mail; and there was a distinction drawn as between people whom we had reason to believe had bought other people's subscriptions, speculators, and the original subscribers, and who were advised and had been required to pay the full amount, the full par value, into the company, in order to have transfers made. At that time, from the best information we had, there was plenty of assets of the company to take care of all such people, besides having ample to take care of all future obligations that might come up." About this time Albada, who had been appointed to audit the company's accounts, prepared a stock register, which the directors adopted. Thereon was a memorandum opposite each of plaintiffs' names, "Trans. from G. L. Dobson," but of this, prepared as it was by one in ignorance of the facts, it furnished no more than *prima facie* evidence, though the register be required by the laws of British Columbia to contain such data.

From this recital of facts, it seems very clear that the

directors, acting in harmony with the wishes of the stockholders, declined to accept more than twenty-five percent of the par value on original subscriptions. That they had the power so to do appears from the act of the Legislature of British Columbia, as well as the articles of incorporation; the latter furnishing the reason for the course pursued.

Upon the filing of a memorandum of association, accompanied by the articles, in compliance with said act, the subscribers thereto, together with such other persons as might, from time to time, become members of the company, became a body corporate capable of exercising corporate functions. It is expressly provided therein that nothing in the act shall "prevent any company incorporated under this act, if authorized by its regulations as originally framed, or as altered by special resolution, from doing any one or more of the following things, namely: . . . (2) Accepting from any member of the company who assents thereto the whole or part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him, or without any call having been made."

But this is merely permissive, and by the fifth article of incorporation it was provided that "the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit." And the twenty-first article reads: "The directors may, if they think fit, receive from any member willing to advance the same all or any part of the money due upon shares held by him beyond the sums actually called for; and upon the money so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance had been made, the company shall pay interest at such rate as

the members paying such sum in advance and the directors agree upon."

It was competent for the board of directors or the managing directors, acting as a committee in their stead (the articles so authorizing them), to direct that certificates be issued to original subscribers upon payment of twenty-five percent of their par value, and to determine whether the company should decline to receive more than that from subscribers willing to pay more, or receive the same and pay such interest as might be agreed upon. The board of directors very promptly, and long before any certificates of shares were issued to subscribers, declined to accept any in excess of the amount named by ordering that all in excess of twenty-five percent paid in by the original subscribers be returned to them. This was tantamount to accepting the twenty-five percent of the par value of all stock originally subscribed for and declining to accept any payments above or in excess of such percent, and this at the earliest opportunity after the complete organization of the company. Having declined to accept such payments, regardless of whether this was to avoid the interest charge, or for the reasons given by Mr. Crissman, to whom did such excess belong? Not to the company; for it had declined to accept it. It had been placed in the hands of Bliss, the secretary, through Mrs. Hamilton, and reached the treasury of the company for no other purpose than in payment of stock. Manifestly such excess, upon being declined by the company, should have been returned to the original subscribers, and the company became responsible therefor as for money had and received. On what theory it can be said to constitute a trust fund has not been quite satisfactorily explained. It was not acquired wrongfully, at least the record contains no charge of that kind. It reached the coffers of the company precisely as the original subscribers intended it should; and the only dereliction of the company, if any there was, lies in that it failed to pay back to each of these plaintiffs

the excess above twenty-five percent of the par value of the stock obtained by him, that is, conceding him to have been an original subscriber, as he might have been found.

It has seemed necessary to state the facts somewhat fully, and the conclusions mentioned, before taking up the questions on which this appeal must be disposed, which will appear after a recital of the allegations of the petition, as amended. . The plaintiffs alleged the organization of the company, the taking of subscriptions of stock on payment of twenty-five percent of the par value; that each plaintiff subscribed for stock and made payments as stated; that the directors are engaged in settling the affairs of the company; that plaintiffs paid seventy-five percent on their stock more than other subscribers; that the company has refunded to other subscribers all paid in excess of twenty-five percent of the par value; that plaintiffs have joined in the action to avoid a multiplicity of suits, and have no plain, speedy, and adequate remedy at law; that, unless restrained, defendant will distribute the funds on hand and deprive plaintiffs of every part of the assets. The prayer was for a judgment in favor of each plaintiff separately for the excess over twenty-five percent of the par value by him paid, and that a temporary writ of injunction issue, restraining defendant from disposing of the funds on hand. The writ was issued as prayed; and in response to a motion for more specific statement an amendment to the petition was filed, alleging that the stock was procured through the secretary of the company, and that paid-up certificates of stock were issued to plaintiffs; and, further, "that the excess payments made by these plaintiffs over and above the twenty-five percent of their stock over and above what was paid by the other stockholders, is a trust fund in the hands of the board of directors, which they have no right to use for the purposes of the corporation, but that the board of directors have full power and authority to raise more money, if needed by a proper assessment upon all

stockholders of said corporation; and that, instead of using the money in their hands belonging to these plaintiffs for the purposes of the corporation, and for the purpose of conducting a large amount of litigation in which this company is engaged, the directors should be required to make an assessment upon the stockholders *pro rata* for such purpose, and for the further purpose of refunding to these plaintiffs the amounts which they have paid on their stock in excess of the amounts by them required to be paid by other stockholders. Wherefore plaintiffs pray as in their original petition, and that the directors be required and directed to make an assessment upon all of the stockholders of the company, for the purpose of raising a sufficient fund to pay the claims of these plaintiffs, if the funds which they now have on hand are insufficient to pay said claims of plaintiffs, and for such other and further relief as may be just and equitable in the premises." Before the filing of the amendment, defendants moved that the names of all plaintiffs, except John Miller, or such other plaintiff as they might elect to retain as plaintiff, be stricken from the petition, and also the allegations of the petition relative to the plaintiffs whose names shall be so stricken, for that the demands alleged and remedies prayed were not held by the same party, nor against the same party in the same right. Defendants also moved that the cause be transferred to the law side of the calendar. These motions were overruled, as also was a motion to dissolve the injunction. These rulings may be taken up in the order mentioned.

Our statute provides that "all parties having an interest in the subject of the action, and in obtaining the relief demanded, may join as plaintiffs except as otherwise provided." Section 3460, Code. A similar provision appears in the Codes of many of the states, and the better opinion seems to be that its design is to apply the rules which formerly obtained in chancery practice, with respect to parties plain-

1. PARTIES:
misjoinder as
plaintiffs.

tiff, to all actions. Pomeroy's Code Remedies, section 113; *Home Insurance Co. v. Gilman*, 112 Ind. 7 (13 N. E. 118); *Trompen v. Yates*, 66 Neb. 525 (92 N. W. 647). The petition, as amended, does not bring the parties within the letter or the spirit of this statute. The claims of these plaintiffs may have grown out of the same transaction; but no plaintiff is interested in the cause of action of another; nor is any plaintiff interested in the relief demanded by the others. That the claims are of the same nature and the relief sought is of the same kind will not justify joining in one suit. The amount or kind of interest is not very material. As laid down by Prof. Pomeroy (Remedies and Remedial Rights, 199): "The extent of the interest is not the criterion, nor the source nor origin. If the person have any interest, whether complete or partial, whether absolute or contingent, whether resulting in a common share or the proceeds of the suit, or arising from the stipulations of the agreement, the language applies without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal." *First Nat. Bank v. Hummel*, 14 Colo. 259 (23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257).

But, to justify joining parties as plaintiffs in an action, there must be some community of interest in the particular claim pressed for adjudication, and some common benefit or advantage in the relief sought. As observed in *Martin v. Davis*, 82 Ind. 38: "To entitle two or more persons to join as plaintiffs, it is not sufficient that they each have a cause for action arising out of the same transaction or matter, if the relief sought by each be distinct and unconnected. The plaintiffs must have a common interest in the subject of the action and in the relief. Each must be interested in the relief sought by the other." The rule so clearly stated was applied in *Bort v. Yaw*, 46 Iowa, 323, and there is no decision in this state to the contrary. In *Richman v. Board of Supervisors*, 70 Iowa, 627, the subject-

matters of litigation were the proceedings of the board of supervisors, and the remedy sought was a judgment declaring these void, and, as the several landowners were interested in both, they were held properly joined.

Other rulings wherein the levy of taxes or assessments have proceeded on the same theory, are *Brandirff v. Harrison County*, 50 Iowa, 164; *Watson v. Phelps*, 40 Iowa, 482; *Palo Alto Banking & Investment Co. v. Mahar*, 65 Iowa, 74.

The right of several creditors to join in an action to discover and subject property to the satisfaction of their claims is put on the same ground. *Gorrell v. Gates*, 79 Iowa, 632. See, also, *De Louis v. Meek*, 2 G. Greene, 55. In *Skiff v. Cross*, 21 Iowa, 459, sureties on an official bond, who together had paid a judgment against their principal, were held to have properly joined in an action to recover the amount so paid.

The rule is tersely stated in Cooper Eq. Pl. 182: "The court will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of distinct natures against several defendants." *Faivre v. Gilliman*, 84 Iowa, 573; *Rhoads v. Booth*, 14 Iowa, 575; Cases collected in 30 Cyc. 114 and 15 Pl. & Pr. 731; *McIntosh v. Zaring*, 150 Ind. 301 (49 N. E. 164); *Keary v. Mutual Reserve Fund Life Ass'n* (C. C.) 30 Fed. 359; *Lewis v. Eshleman*, 57 Iowa, 633; *Utterback v. Meeker*, 16 Wash. 185 (47 Pac. 428); *Shull v. Barton*, 56 Neb., 716 (77 N. W. 132, 71 Am. St. Rep. 698). See *Tackaberry v. Sioux Service Co.*, 154 Iowa, 358.

The claims of the several plaintiffs were separate, distinct, and independent one from the other, and the relief sought was of the same character; and the court erred in overruling the motion to require plaintiffs to elect in the name of which the action be prosecuted, and to dismiss as to all others.

IV. The only relief sought in the petition when the motion to transfer to the law side of the calendar, was ruled on, was a money judgment, and overruling the motion was error. It is not contended, however, but that the amendment to the petition stated additional grounds for and demanded equitable relief. If so, then the error was without prejudice; for, had the court sustained the motion, it would have been competent for it, on the motion of either party, or on its own, to have transferred the cause back to the equity side. We are not saying that the petition, as amended, stated an equitable cause of action (that can only be determined when prosecuted); but, assuming that it did, as appellants appear to concede in argument, there was no prejudice in the court's ruling.

2. ACTIONS:
transfer of
causes: harm-
less error:

The recital of facts, nearly all of which were brought to the court's attention in support of or resistance to the motion to dissolve the temporary writ of injunction, quite clearly indicates that the moneys paid by the several plaintiffs did not constitute a trust fund in the hands of the company.

3. CORPORATIONS:
payment for
stock: conver-
sion: rights of
stockholders.

If, as is contended, they were original subscribers, then, under the resolution of the directors, the last payment of seventy-five percent on their subscription was refused by the company; and if, instead of returning the same, it converted the money to its own use it became liable to them therefor. On no tenable theory can it be said that such conversion constituted it a trust fund. There was no evidence that it was kept apart from what belonged to the company; but, on the contrary it was mingled therewith and payment refused. Whether by receiving fully paid certificates of stock the company elected to accept the last payment, and plaintiffs acquiesced therein, are matters to be determined later; the circumstances tending to repel these inferences. See *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa, 214. Of course, a shareholder,

as such, is not a creditor (*Esgen v. Smith*, 113 Iowa, 28), and has no distinct right to any part of the corporate property. *Warfield v. Clark*, 118 Iowa, 69; *Stewart v. Pierce*, 116 Iowa, 733. But the corporation may become indebted to a stockholder precisely as to a stranger; and if it refuses to accept money tendered as subscription for stock, and converts the same to its own use, its liability therefor is precisely as though it had converted the property of a stranger.

The petition is without allegation that the corporation is insolvent. It may be that the funds on hand are likely to be paid for other purposes than to satisfy plaintiffs' claims; but unpaid subscriptions constitute a trust fund for the benefit of creditors. *State Bank Bldg. Co. v. Pierce*, 92 Iowa, 668. And there is no suggestion but that these will be paid, if necessary, and that there will be ample funds to meet every obligation. This, as clearly appears from an examination of the petition and amendment, is not an action to wind up the affairs of the company. This must be done in the jurisdiction where the company was organized. 2 Cook, Corp. section 632. In any event, it could not be dissolved by a court of equity. *Wallace v. Pub. Co.*, 101 Iowa, 313.

The only relief to which any plaintiff, if successful, appears to have been entitled is a money judgment, and for this reason the court erred in not sustaining the motion to dissolve the temporary writ of injunction.—*Reversed*.

McCLAIN, C. J., and DEEMER, J., take no part.

STATE OF IOWA, Appellee, v. JOHN ROGERS and JOE ROGERS, Appellants.

Criminal law: ERROR IN NAMES: HARMLESS ERROR. Neither the fact
1 that the court in his instructions spelled the name of defendant
"Rodgers" when his true name and that in the indictment was

"Rogers;" nor the fact that the foreman of the jury signed the verdict "Ira A. Stout" while his name in the jury list was "Ira Stout," there being no question as to his identity, or that he was not the person who acted as foreman and signed the verdict, was sufficient to cause a reversal.

Burglary: CIRCUMSTANTIAL EVIDENCE. Where the evidence of a
2 burglary, though wholly circumstantial, is clear and direct, and covers all elements of the charge, the verdict of guilty will not be disturbed.

Same: SENTENCE: EXCESSIVE PUNISHMENT. Where the purpose of a
3 burglary was the theft of property of small value and the same was stolen to meet the necessities of poverty, a penitentiary sentence was excessive punishment, and the same is reduced to a jail sentence of nine months with credit for the time served in the penitentiary.

Appeal from Washington District Court.—HON. K. E. WILCOCKSON, JUDGE.

TUESDAY, OCTOBER 15, 1912.

AN indictment for burglary under the provisions of section 4791 of the Code. There was a plea of not guilty, and a verdict and judgment of conviction. The defendant John Rogers appeals.—*Modified and Affirmed.*

P. J. Hanley, for appellants.

George Cosson, Attorney General, and John Fletcher, Assistant Attorney General, for the State.

EVANS, J.—The defendants are father and son; the son, Joe Rogers, being twenty-two years of age. They were indicted and tried jointly. The trial court imposed a jail sentence only upon the defendant Joe Rogers. He has served out his time, and asks for no consideration on this appeal. The defendant John Rogers was sentenced to the penitentiary for an indefinite period; the maximum being ten years.

From the testimony of the state, it appears that on the night of December 7, 1911, a pair of horse blankets were stolen from the buggy and from the buggy shed, of one Reeves. The door was fastened with a "slide clutch." It was closed the night before, and was found closed the next morning after the disappearance of the blankets. The stolen blankets were soon thereafter found in the possession of the defendants. There was also evidence tending to show that they were in that vicinity that night between twelve and two o'clock. The defendants on their part claimed to have owned and to have had possession of the blankets long prior to December 7th. The dispute at this point was a question of identification.

The defendants were transients in the neighborhood, having stayed there awhile with a brother-in-law. They claimed an actual residence in Scott county. Shortly after the night of December 7th, they left the immediate neighborhood for the neighborhood of Gladwin, where they engaged in a job of wood chopping, for hire. It was here, about December 20th, that the blankets were found in their possession.

I. The instructions of the trial court bore the title of the case. In such title, however, the name of the defendants was spelled "Rodgers." It is urged by appellant that this mistake was fatal to the validity of the instructions, and that its effect was to leave the record without any instructions, in that the names applied to the defendants were wholly different from their true names. The point is trivial, and entitled to no consideration.

1. CRIMINAL
LAW: error
in names:
harmless
error.

It is also urged that the verdict was signed by a foreman who was not a member of the jury. The verdict purported to be signed by Ira A. Stout; whereas the name as it appeared in the jury list was Ira Stout. No question is raised as to the real identity of the juror. No claim is made but that the juror Ira Stout was the person who

acted as foreman and signed the verdict as Ira A. Stout. This objection is on a par with the previous one, and has no merit whatever. To seek and to cite authorities against such a proposition would be to pursue a flea with a flail.

II. It is earnestly urged that the evidence was not sufficient to sustain the verdict. The evidence was wholly circumstantial. It was clear and direct, however, as to the

2. BURGLARY:
circumstantial
evidence

corpus delicti. It was also positive and direct as to the possession of the alleged stolen property by the defendants within a brief time after the alleged burglary. This was corroborated by the evidence of two witnesses, who claimed to have seen the horse and wagon of the defendants, between twelve and two a. m., in the immediate neighborhood. This rig was seen two or three times within a period of two hours. At one time it was standing, with one man sitting therein. At a later time it was passing along the highway, with two men sitting therein. We think the evidence was such as to cover every element of the charge made, and that it supported the verdict rendered.

III. It is next urged that the punishment inflicted was excessive as to the appellant John Rogers. A sentence of three months in the county jail was imposed upon de-

3. SAME: sen-
tence: exces-
sive punish-
ment.

fendant Joe Rogers. The statute under which the prosecution was had provides for alternative punishment by imprisonment in the penitentiary not exceeding ten years, or in the county jail not exceeding one year. The contention now is that a jail sentence would have been commensurate with the offense proved against this appellant. It must be said that the evidence bore exactly alike upon both defendants. There was nothing in the circumstances proved which tended to show either defendant more or less guilty than the other. The one point of difference appearing is that the appellant was the father of his codefendant, and might be deemed to have exercised more or less authority or influence over him,

notwithstanding that he had attained his majority. Just how much consideration should be given to this fact could be better judged by the trial judge, because of his opportunity of personal observation of each defendant. We would not be justified, therefore, in saying that he should not have imposed a greater sentence upon the father than upon the son. We have given the record much consideration, however, as to whether it justifies a more severe punishment than a jail sentence. A burglary is a serious offense in any form, and we will not minimize it. Nevertheless we must apply the minimum provisions of the statute to those forms of its violation which are the less flagrant. Having fixed upon a penitentiary sentence, the trial court was helpless to reduce the term.

The purpose of the breaking in this case was to steal the horse blankets. They were stolen. They were of the value of \$3.50. It is apparent from the record that the defendants were under some pressure of poverty. They were preparing to set up a tent while engaged in wood chopping. They were living in a tent when the blankets were discovered in their possession. The blankets were used as a part of their bedding. These circumstances in no sense excuse the offense. This was serious from any point of view. But it is our duty to consider them, nevertheless, as bearing upon the degree of punishment which ought to be meted out, but within the spirit of the statute. We reach the conclusion that a jail sentence of eight or nine months would meet the ends of justice under the statute, and that a penitentiary sentence was excessive.

It will be the order of this court that the sentence be reduced to nine months in the county jail. It being made to appear, also from the record before us, that the appellant has been serving his sentence in the penitentiary since his conviction, and for a period of nine months, it will be ordered that the time so served shall apply upon the jail

sentence here ordered, and that he be deemed to have served the full term of such jail sentence. The judgment below as so modified is—*Affirmed*.

C. A. BEATLE, Appellant, v. T. P. ROBERTS, et al.

Intoxicating liquors: CANVASS OF CONSENT: WHEN TO BE MADE.

- 1 Statements of consent to the sale of liquor must be canvassed by the board of supervisors at a regular meeting of that body as fixed by statute, or at a future date to which such meeting has been adjourned.

Same: SUPERVISOR MEETINGS: ADJOURNMENT. Where the board met

- 2 for the regular January session, two of its members having just been re-elected, and transacted the unfinished business of the preceding year and thereafter the newly elected members qualified, the new board organized and proceeded with its business without other interruption, there was in fact no final adjournment of the regular session, although their record showed an adjournment *sine die*; as an adjournment contemplates the act of separation and departure of the members of the board for some period of time: So that the board was in regular session and could legally canvass the statement of consent at that meeting.

Same. Each session of a board of supervisors necessarily terminates

- 3 prior to the day fixed by statute for a succeeding regular session.

Same: QUALIFICATION OF SUPERVISORS. Newly elected supervisors

- 4 should qualify immediately upon the convening of the regular January session of the board; but re-elected members failing to do so are authorized to act until their subsequent qualification; besides, in this instance, there was a quorum for the transaction of business without them, and in either contingency the business was legally transacted.

Same: ORGANIZATION OF BOARD. The statute requiring a newly organ-

- 5 ized board of supervisors to elect one of its members chairman is directory in character, and mere delay in doing so will not impair the validity of its acts.

Same: PAROL EVIDENCE: ADMISSIBILITY. Oral evidence that there was

- 6 no final adjournment of the board was not in contradiction of

the recital of an adjournment *sine die*, but was admissible to aid in determining from the record what was in fact done.

Boards of supervisors: AMENDMENT OF RECORDS. A board of supervisors has power to amend its record so that it shall speak the truth, but an amendment showing that the board took a recess rather than adjourned to another day was not material; as the terms are synonymous and mean a postponement to a time specified.

Same: ADJOURNMENT OF MEETINGS. The board of supervisors has power to adjourn its meetings from day to day; and where the record shows that an adjournment was taken for the purpose of transacting business, which for some stated reason could not then be done, the date to be determined by the happening of a future event, as the completion of an examination by an expert with the county treasurer's books, the adjournment was from time to time, within the meaning of the statute.

Appeal from Union District Court.—HON. THOS. L. MAXWELL, JUDGE.

TUESDAY, OCTOBER 15, 1912.

THE district court approved of the finding that the statement of consent to the sale of intoxicating liquors in the city of Creston was sufficient. The plaintiff, who objected to such statement, appeals.—*Affirmed.*

Carl Stanley, and H. H. Sawyer, for appellant.

D. W. Higbee and S. R. Allen, for appellees.

LADD, J.—A statement of consent to the sale of intoxicating liquors in the city of Creston was filed with the county auditor in February, 1911, and canvassed by the board of supervisors of Union county, March 20th and 21st following. An objection that the supervisors were not in regular session was interposed, but overruled, and the statement found sufficient. On appeal the district court approved this ruling.

I. Section 2448 of the Code requires such canvass to be made at a regular session of the board of supervisors, and this would be at a time fixed by statute for the convening of that body, or at a fixed future date to which such a meeting is adjourned. *Butterfield v. Treichler*, 113 Iowa, 328.

1. INTOXICATING
LIQUORS: can-
vass of con-
sent: when to
be made.

The time for the first session of the year is designated by section 412 of the Code Supplement as the second secular day of January, which in 1911 was January 3d, and the supervisors met on that day. There were five members, two of whom had been re-elected, and they proceeded to transact the unfinished business of the previous year. Later they adjourned until the next day, the record of the proceedings during which contains the following: "And now, the hour of 1:30 o'clock p. m. having arrived, it was moved by Sullivan and seconded by Davale that the board do now adjourn *sine die*. Motion carried and adjournment declared. Board adjourned *sine die*." Immediately following that quoted, and on the same day, this appears of record: "And now, the board of supervisors were called to order by the auditor and the new members-elect, White and Roberts, were sworn. Roll call showed all members present. . . . On motion of Wallace seconded by Roberts, Mr. Sullivan was elected chairman for the ensuing year." The evidence discloses that there was no change in the personnel of the board, that the members did not leave their seats between the adoption of the first motion and the so-called reorganization, and that one followed immediately upon the other. The transaction of business was uninterrupted, save by the performance described, and adjournments were taken from day to day until January 6th, when there was an adjournment which will be considered hereafter. While the motion was sufficient in form to evidence an adjournment, the record as a whole affirmatively shows that no

2. SAME:
supervisor
meetings:
adjournment.

adjournment was in fact taken. An adjournment is an act, not a declaration. It is an act of separation and departure, and, until this takes place, the adjournment is not complete. So it has been held that, although an adjournment of court had been announced and the judges had risen to go, court was still in session and might receive a verdict. *Persons v. Neigh*, 52 Pa. 199. To adjourn means the same thing as to postpone, and, while more frequently used to indicate the putting over to another day, it has acquired the meaning of suspending what is being done for a period which may be less. *La Farge v. Van Wagenen*, 14 How. Prac. (N. Y.) 54. In *People v. Martin*, 5 N. Y. 22, 26, adjournment is defined as putting off until another time or place. In *French v. Higgins*, 77 Wis. 121 (45 N. W. 817), the court, after mentioning that Webster says the word "adjourn," both in England and this country, is applied to all cases in which public bodies separate for a brief period with a view to meeting again, said: "As applied to a justice's court, it signifies, we think, not only that the justice ceases to exercise his functions in the particular case for the time being, but that he and the parties, witnesses, jurors, and officers in attendance, separate from the place of trial, so that there remains no court at such place. If that result is accomplished, it is an adjournment, no matter by what name the justice designates the proceeding in his docket. If that result is not accomplished, it is not an adjournment, but a mere suspension of the proceedings in the cause for a time." See, also, *Bispham v. Tucker*, 2 N. J. Law, 253; *People v. Draper*, 1 N. Y. Cr. R. 138. "An adjournment is suspension of a judicial tribunal or other official body until a time certain, or definitely where the adjournment is without day." 1 Ency. Pl. & Pr. 238.

An adjournment, then, may mean merely a temporary suspension of business or the postponement thereof until some future date.

All members of the board of supervisors were present the day on which they were required by law to convene, and, even though some of them may have imagined that

the session was merely the continuance of
3. SAME. the November session, this was not so. The law in fixing the time for the first session of the year necessarily defined the limit beyond which the session previous might not extend. In other words, each session of the board necessarily terminates prior to the day fixed by the statute for another meeting.

The two members who had been re-elected should have qualified immediately, but even without them there was a quorum for the transaction of business. Moreover, though

their terms had expired on the first Monday
4. SAME: qualification of supervisors. in January, they were authorized to serve until their successors had qualified. Section 411, Code Supplement.

Section 415 of the Code requires the board of supervisors, at its first meeting in the year, to "organize by choosing one of their members as chairman, who shall preside at all its sessions during the year."

5. SAME: organization of board. This means that before proceeding to the transaction of business at the meeting on the second secular day of January, the members should organize as required, but the statute is directory in character, and the mere delay in effecting such organization did not impair the validity of anything done.

Of course, there was no occasion for the entries concerning adjournment. The business required to be transacted at the January session had not been disposed of, and

the entire record demonstrates that the board
6. SAME: parol evidence: admissibility. did not entertain the purpose of separating and terminating the session. Therefrom it appears that they did not do so, and the oral testimony was not received to contradict the record, as seems to be assumed by appellant, but to aid in determining from the

record, which is contradictory, what, in fact, was done. We are satisfied that there was no final adjournment of the board, but merely a temporary suspension of their business for the purpose of effecting organization as required.

II. The board, having disposed of the business before it, save settling with the county treasurer, the following entry was made January 6, 1911: "On motion the board
7. BOARDS OF
SUPERVISORS:
amendment
of records. adjournment to meet at the call of the county auditor for the purpose of receiving the report of the expert accountants and the transaction of regular business." On the 13th of the same month the supervisors met on the call of the county auditor, and thereafter adjournments were made from time to time until March 20, when the canvass was begun. On March 21st the board amended the record of January 6, 1911, so as to read: "And now it is moved and seconded and carried that this board do now take a recess until the expert accountants have completed their examination of the treasurer's account, and that the auditor so notify the several members when said examination is completed, and that they then at once resume and complete the business now necessarily delayed." That such a body may so amend its record as that it shall speak the truth can not well be questioned. *Tod v. Crisman*, 123 Iowa, 693. See *Mann v. City of Le Mars*, 109 Iowa, 251.

The change effected seems to be in specifying the time more definitely and the substitution of the expression that "the board now take a recess," instead of adjourn. The use of "recess," instead of "adjourn," is unimportant. *Ex parte Mirande*, 73 Cal. 365 (14 Pac. 888). Both mean that the meeting was postponed until the time specified.

Section 422, par. 2, of the Code, expressly authorizes the board "to adjourn from time to time." This means to some time specified. As the statute fixes the dates of regular meetings there is no occasion for publishing notice, but special meetings can be held only on the written request

of a majority of the members and after notice thereof has been published. Section 420, Code. It is
8. SAME: adjournment of meetings. apparent that the meeting on the 13th was not a special session and was wholly unauthorized, unless the board may adjourn to a time not specifically designated, but to be determined by a future event. This adjournment appeared in the record of the board, and was a part of the proceedings required to be published. Section 441, Code, Supp. No one was informed as to the time the expert accountant would be engaged in examining the treasurer's books, and the members could not well continue in session in the meantime. Had a particular day been fixed, several meetings might have been necessary at the expense of the county and inconvenience of the board. The postponement was merely till the expert had completed the examination of the treasurer's accounts, and no one will pretend but that these should be promptly settled with that officer. Though the time to which adjournment was taken was not definite, it became so upon the happening of a specified event; i. e., the completion of the examination of the books. This involved no concealment, for the proceedings disclosed what had been done as fully as though the postponement had been until a named day, and there was the same publicity. Moreover, any one interested might have ascertained the date of the meeting which the record disclosed was contemplated when the adjournment was taken. There is nothing in the statute exacting that an adjournment shall be to a designated day. It is to be from "time to time," and such time to which adjournment is had may be a day named or one which will be definitely fixed or made certain by that which subsequently transpires. Had the adjournment been simply at the call of the auditor or chairman, without anything from which to determine the time of the meeting, it must have been regarded as an adjournment without day. To hold otherwise would defeat the purpose of the statute with reference to special

sessions. But where the record discloses that a specified session in the future is contemplated, and the order or resolution of adjournment clearly indicates that it is for the purpose of transacting business which, for some reason stated, can not be taken care of at the present, and the date of the meeting is so certainly designated that it may be definitely determined by the happening of a future event, then it is an adjournment from time to time within the meaning of the statute quoted.

It follows that the board of supervisors were in regular session on January 13th, and, as the subsequent adjournments are not questioned, it continued in regular session when passing on the statement of consent.

The judgment of the district court so holding is—
Affirmed.

TRUMAN JONES v. A. C. FISHER, Chairman of Board of
Supervisors of POLK COUNTY, et al., Appellants.

Elections: CONTESTS: PRIMARY ELECTIONS: STATUTES. The provisions
1 of the statutes by which a court of contest is given authority to examine witnesses and determine contested elections to county offices have no application to primary elections.

Primary elections: CONTEST: AUTHORITY OF SUPERVISORS. The power
2 of the supervisors in case of a contested primary election is limited to a recount of the ballots as cast, on a showing of fraud, error or mistake in the count as returned by the judges of the election; they have no authority to inquire into the legality of a ballot which has been received by the judges.

Same: REVIEW OF ILLEGAL ACTION OF SUPERVISORS: *Certiorari*. Al-
3 though the statute authorizing a recount of the ballots by the supervisors in a contested primary election provides that their action in so doing shall be final, such provision does not prevent a review of the illegal act of the board in determining a matter not within its jurisdiction; and *certiorari* is the proper remedy in such case.

Appeal from Polk District Court.—HON. JAMES P. HEWITT, JUDGE.

TUESDAY, OCTOBER 15, 1912.

A proceeding by certiorari was instituted in the lower court to annul a certain alleged illegal action of the board of supervisors of Polk county, as a board of canvassers, in declaring the result of a recount of the ballots cast at a primary election, as a result of which recount it was declared that A. C. Fisher was the candidate of the Republican party for the office of member of the board of supervisors. The court annulled the action of the board. From this decision of the court, the defendants, who are members of the board of supervisors, and the county auditor appeal.—*Affirmed.*

Read & Read and *John J. Halloran*, for appellants.

John McLennan and *E. J. Kelly*, for appellee.

McCLAIN, C. J.—The plaintiff, Truman Jones, and one A. C. Fisher, who as chairman of the board of supervisors is one of the defendants in this action, were opposing candidates for the Republican nomination to the office of supervisor at the primary election held June 3, 1912. The returns of the election from all the voting precincts gave Jones a majority of one vote over Fisher. Within the time provided by law, Fisher filed with the board of supervisors a verified statement alleging fraud and mistake in the returns from the First precinct of Bloomfield township, and that illegal votes had been received in that precinct, and demanding a recount of the ballots as provided by the statute regulating primary elections. The board ordered a recount, and found that the vote as shown by the voting machines used in such precinct had been cor-

rectly returned, but it proceeded further, and examined witnesses for the purpose of determining whether any illegal votes had been recorded, and, finding as a result of such investigation that three illegal votes had been recorded in said precinct for Jones, it deducted that number of votes from the total number originally returned for him, and declared that a majority of the votes cast at the county primary was in favor of Fisher. Thereupon this proceeding by certiorari was instituted to annul the findings of the board of supervisors made as a result of its action in pretending to recount the votes, and the lower court held that the board was without jurisdiction to go beyond the recorded votes as shown by the voting machines, and receive evidence as to whether illegal votes had been recorded, and it therefore annulled the action of the board. We are asked upon this appeal to determine whether the lower court erred in so holding.

There are provisions in the Code for the determination of contested elections to county offices by a court of contest which is given authority to examine witnesses and determine who is entitled as the result of the election to hold the office to which the contest is prosecuted, with a right of appeal to the district court. See Code, sections 1198-1222. But these provisions have no application to primary elections which are now provided for by chapter 51 of the Acts of the Thirty-Second General Assembly (Code Supplement, sections 1087-a1-1087-a35), as amended by chapter 69 of the Acts of the Thirty-Third General Assembly.

The provisions for a contest with reference to the result of a primary election are those found in section 9 of the amending act, which, so far as it is material, reads as follows:

Any candidate whose name appears upon the official primary ballot of any voting precinct may require the board of supervisors of the county in which such precinct

is situated to recount the ballots cast in any such precinct as to the office for which he was a candidate, at the time fixed for canvassing the returns of the judges of election, by filing with the county auditor . . . a showing in writing duly sworn to by such candidate, that fraud was committed or error or mistake made in counting or returning the votes cast in any such precinct as to the office for which he was a candidate. The showing must be specific, and from it there must appear reasonable ground to believe that a recount would produce a result as to his candidacy different from the returns made by the judges. If such showing is made to the satisfaction of the board, it shall thereupon recount the ballots cast in any such precinct for the office for which the contestant was a candidate, and if the result reached by the board on the recount of the ballots as to such office be different from that returned by the judges of election, it shall be substituted therefor as the true and correct return, and so regarded in all subsequent proceedings. The action of the board shall be final and no other contest of any kind shall be permitted.

It will be observed that it is fraud committed, or error or mistake made, in counting or returning the votes cast in any such precinct which may be complained of, and that the board of supervisors is directed upon the proper showing being made to recount the ballots cast in any such precinct, and if, as a result of such recount the returns of those cast in the precinct be found incorrect, the true returns as found by the board of supervisors shall be substituted and the result of the primary be declared accordingly. In short, the power conferred upon the board of supervisors is to recount the ballots actually cast for the purpose of correcting the returns, if they be found erroneous through fraud or mistake. No authority is conferred upon the board to determine whether the persons who cast ballots in the precinct at the primary election were entitled to cast such ballots. The judges of the primary election seem to have no duty imposed upon them with reference to the right of one proposing to

2. PRIMARY ELEC-
TIONS: contest:
authority of
supervisors.

cast a primary ballot to do so, save that of entertaining a challenge, and requiring the proposed voter to take the prescribed oath to his qualifications, and then to count the ballots received and make return of the results of the election. See Code Supplement, sections 1087-a9 and 1087-a17. We can not discover from the reading of the section of the act above quoted that the board of supervisors, in case the returns from any precinct are challenged, has authority to do more than recount the ballots and verify or correct the returns.

The voting at the precinct in question was by voting machines, and therefore the sole function of the board of supervisors making a recount was to verify the votes as shown by the machines for the purpose of determining whether the returns of such votes were correct. Having ascertained by examination of the machines that the votes shown were correctly returned, and the recount was concluded, and the board had no other authority than that of announcing the result in accordance with the correct returns. That the action of the board was wholly unauthorized and illegal is apparent from another consideration. If they had authority to inquire into the validity of the votes by taking evidence of voters as to their qualifications, then they should have determined anew the result of the primary election in the precinct in question. Evidence was introduced before them tending to show other illegal votes were cast than the three illegal ones which were cast for Jones and which they rejected, but, without any finding as to whether any other illegal votes were cast and for whom they were cast, the board simply determined that three illegal votes were cast for Jones, and thereupon the conclusion was reached that these three votes should be deducted from the total in his favor. It may have been that, if the board had passed upon the evidence presented, it would have been found that illegal votes were also cast for Fisher which should be deducted from the total of the votes returned

for him. The consideration last suggested is, however, as we view it, immaterial, for we hold that the board had no authority to examine witnesses, in the attempt to ascertain whether the persons who were allowed to vote at the primary were entitled to do so. The board of supervisors can exercise no authority with reference to the primary election beyond that conferred upon it by statute, and the statute plainly does not confer upon the board the power to inquire into the right of the voter to cast the ballot which has been received by the judges of the primary election.

For appellant it is contended that the lower court had no authority to inquire into the legality of the action of the board for the reason that, as provided in the section of the act already quoted, "the action of the board shall be final and no other contest of any kind shall be permitted." But the lower court did not attempt to review the action of the board for the purpose of determining whether in the exercise of the power conferred upon it, a correct result had been reached. The court did not attempt to retry the case. It was asked to find that the board attempted to exercise a jurisdiction and authority not conferred upon it by statute, and we see nothing in the language just quoted to preclude such an inquiry. The writ of certiorari may be granted "in all cases where an inferior tribunal, board, or officer exercising judicial functions, is alleged to have exceeded his proper jurisdiction or is otherwise acting illegally" (Code, section 4154), and a statutory provision making the finding of the board of supervisors conclusive as to a matter within its jurisdiction does not preclude an inquiry as to whether its action was in excess of its jurisdiction. Many cases will be found in our reports where the jurisdiction of a board or lower tribunal has been inquired into on certiorari, although no appeal or other

3. SAME: review
of illegal
action of
supervisors:
certiorari.

method of reviewing the correctness of the action of such board or tribunal has been provided.

There is a further contention for the appellant that the remedy of plaintiff, if any, was by mandamus to compel the board to act, and not by certiorari. But it appears that the board did act, and did find the returns of the primary election, so far as it was authorized to inquire into the matter, were correct. Its action in conducting a wholly unauthorized inquiry and in announcing as a result of such inquiry that the returns were incorrect and should be set aside was outside of its jurisdiction and illegal.

Judgment of the trial court was in accordance with the law, and it is—*Affirmed.*

STATE OF IOWA v. JOHN JACKSON, Appellant.

Jurors: QUALIFICATION: OATHS. A person otherwise competent as a
1 juror may take the oath, regardless of his religious convictions, provided he regards it in the form administered as binding upon his conscience; and if taken without objection it will be assumed that he so regards it: So that even though a juror denied belief in a Supreme Being, future reward or punishment, or in the Scriptures, but took the usual oath, he was not disqualified by reason of his unbelief.

Criminal law: EVIDENCE: ADMISSION UPON MOTION: DISCRETION: PREJ
2 **UDICE.** The trial court is vested with a discretion in determining the question of diligence in procuring evidence offered upon the trial, but not submitted to the grand jury, which will not be disturbed except for an abuse of such discretion resulting in prejudice; and while an error in admitting evidence upon motion under the statute is not in all cases waived by failing to take a continuance, the failure to do so may be considered in determining the question of prejudice.

Same: EVIDENCE TAKEN UPON NOTICE. The examination of a witness
3 whose evidence is taken upon notice need not be strictly confined to those matters specified in the notice.

Same: EVIDENCE: THREATS. Recent uncommunicated threats against

4 one charged with crime, where the plea of self-defense is interposed, are admissible for the purpose of showing who was the aggressor in the affray, but in the instant case the offered evidence is insufficient to show a threat.

Same: VIEW OF PREMISES: DISCRETION. Permission of the jury to view
5 the premises where the crime with which a defendant is charged was committed, is wholly discretionary with the trial court.

Same: ARGUMENT: MISCONDUCT. Where the argument of counsel
6 for the state was based upon what the testimony tended to show, there was no abuse of discretion of overruling a motion for new trial on the ground of misconduct.

Same: EVIDENCE: ADMISSIONS: INSTRUCTIONS. Verbal admissions
7 should be received with great caution, because that kind of evidence is subject to imperfection and mistake; but when deliberately made and accurately proven are often entitled to much weight. The instruction in the instant case is held to state the rule correctly.

Same: SELF-DEFENSE: INSTRUCTION. A violent act in self-defense is
8 justified, where the danger was actual and urgent to the comprehension of a reasonable person. The instruction as given by the court was a correct statement of the law.

Same: DUTY TO RETREAT. One assaulted may stand his ground only
9 when it reasonably appears that he can not retreat in safety.

Appeal from Monroe District Court.—HON. F. M. HUNTER,
JUDGE.

TUESDAY, OCTOBER 15, 1912.

DEFENDANT was indicted for the crime of murder in the first degree. Upon trial to a jury he was convicted of the crime charged and sentenced to the penitentiary for life. He appeals.—*Affirmed.*

Jno. R. Price, for appellant.

George Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

DEEMER, J.—On the night of July 22, 1911, the defendant stabbed one Andrew Bleakey in the abdomen with a knife, which within five days resulted in death. The killing was admitted; but defendant claims that his act was in defense of his person. This issue went to the jury, and the finding was to the effect that the killing was felonious and not justifiable. In order to understand the points relied upon for a reversal, it will be necessary to relate some of the facts, and, as usual in such cases, we give that version of the affair most favorable to the state (except as may be specifically noticed); for the jury found for the state on all the material issues.

On the night of the homicide deceased, with another man and two women, were riding in a buggy near a settlement in Monroe county, known as Sharpend, and there met the defendant in the highway. Defendant said to deceased: "Wait; I want to speak to you." Instead of stopping, deceased, at the suggestion of one of his companions, drove on, and did not see the defendant again until all of the parties met later on the same evening at what is known as the Hooper home in the town of Buxton. It seems that there was some sort of a festival at this home which all the parties named were attending. With the deceased was one Emma Lewis, and when defendant saw her at the Hooper home he immediately stepped to where she was and said that he wanted to speak to her, and invited her outside the house. She refused to go out, and defendant then said, "You damn bitch, I am going to kill you." When the party broke up, the Lewis woman went with the deceased to the buggy, and as she was attempting to get in defendant started after her with a knife in his hand, and chased her around the vehicle once or twice; she finally escaping by going into the house. Deceased then said to defendant: "What is the matter, Coy (meaning Jackson)? What is the trouble, Coy?" This apparently angered defendant, for he said, in effect, "This is not your affair,"

and he immediately started after deceased, still holding his knife in his hand. Deceased struck at defendant with a buggy whip which he had in his hand, and warned defendant not to come any closer. According to some of the witnesses, deceased told defendant to stand back, as he had an automatic revolver. Notwithstanding the warning, defendant continued to advance, and deceased started to run in the direction of a nearby schoolhouse. Defendant followed him, and was apparently gaining on the deceased when the two passed out of view of the spectators. In the melee deceased was struck with a knife in the abdomen, making a wound from two to two and one-half inches long, and deep enough to penetrate and cut the lower bowels. From the wound so inflicted, deceased died within four or five days. To the sheriff who arrested the defendant, he (defendant) admitted that he had stabbed Bleakey, but he said that he did it in self-defense. Defendant's claim now is that if he struck the deceased with a knife at all, which, if true, he does not remember, that it was done near the Hooper house at the time when the deceased struck him with the whip, and, as he claims, threatened to shoot him with a revolver; and that he did not follow the deceased when he started to run toward the schoolhouse. He claims that when deceased struck him with the whip it hit his arm in which he held the knife and benumbed it, so that he does not know what became of the knife. There is no direct testimony as to what occurred after deceased attempted to escape; but, as defendant does not claim that he was compelled at that time to act in self-defense there is no necessity to indulge in any inferences favorable to defendant at that time. This outline sufficiently presents the main features of the case as made for the state. The points relied upon for a reversal will now be considered in order.

I. One of the trial jurors, after being sworn upon his *voir dire* without objection, was asked regarding his religious beliefs. He answered that he believed in a

Supreme Power, but that he did not believe in future re-wards or punishments, had no personal fear of future punishment, and did not believe in either the Old or the New Testament. He was challenged for cause on account of the statements; but the challenge was overruled. After all peremptory challenges were exhausted, defendant's counsel moved for the discharge of this juror, for the reason that he could not take an oath which would be binding upon his conscience. This motion was overruled, and the juror, without objection, took the orthodox oath with all the other jurors. These rulings were correct. The juror possessed all the statutory qualifications, and was not subject to challenge for the reasons assigned. He took the oath without objection, thus evidencing the fact that he regarded it as binding upon his conscience. Under modern rules, oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences. *Gill v. Caldwell*, 1 Ill. 53. If the oath is taken without objection or protest as to form, it will be assumed that the person taking it regards it as binding upon his conscience, in the absence of proof to the contrary. *State v. Gray*, 59 Minn. 6 (60 N. W. 676, 50 Am. Rep. 389). Under our law any person otherwise competent may take an oath and act as a juror, no matter what his religious belief is, provided, of course, that such oath is in a form which the person who takes it regards as binding upon his conscience. *Commonwealth v. Buzzell*, 16 Pick. (Mass.) 153.

II. The state was permitted to use two witnesses (doctors) who were not before the grand jury; nor were their names indorsed upon the indictment. Notice was given the defendant, however, of the state's purpose to introduce these witnesses, and this notice was served two days before the case was reached for trial. This notice was given under section 5373 of the Code, reading as follows:

1. JURORS: qualifi-
cation: oaths.

2. CRIMINAL LAW:
evidence:
admission
upon motion:
discretion:
prejudice.

"Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit, whereupon, if the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the county attorney may examine said witness in the same manner and with the same effect as though four days' notice had been given defendant as hereinbefore provided, except the county attorney, in the examination of witnesses, shall be strictly confined to the matters set out in his motion."

The county attorney filed an affidavit under this statute, and the court permitted him to use the witnesses. This ruling is complained of because of the claim that the affidavit did not show sufficient diligence. This exact question was presented to the district court upon the affidavit of the county attorney and counter affidavits for defendant, and the court held the showing sufficient. In passing upon such motion a wise discretion is lodged in the trial court, and we do not interfere, in the absence of a showing of an abuse thereof. Defendant is fully protected by the provision allowing him to take a continuance; and, while he will not in all cases be held to waive an error in sustaining such a motion by failing to take a continuance, his election not to do so may be considered in determining whether or not he was prejudiced by the ruling on the motion. The witnesses testified simply as to the extent and nature of the wounds upon the deceased, and as to the cause of his death, and we are abundantly satisfied that no prejudice resulted in the ruling now questioned.

In this connection it is claimed that the witnesses were permitted to testify to matters not included in the notice given by the county attorney. This is not a valid ground of objection. *State v. Trusty*, 122 Iowa, 82; *State v. Boomer*, 103 Iowa, 115. At any rate there was no such variance as would justify a reversal.

3. SAME: evidence taken upon notice.

Complaint is made of the court's ruling refusing to strike some of the testimony of one of these witnesses, upon the ground that his conclusion was based upon hearsay testimony. We have examined this complaint and find no merit in it.

Defendant complains that, without excuse, counsel for the state were permitted to put leading questions to various witnesses. Here, again, the claim is without substantial merit. In a few instances the objection might have been sustained; but no abuse of discretion is shown. Some complaint is made of the redirect examination of the witness Emma Lewis. By an amended abstract, which is not denied, the state has eliminated the question, showing that the matter was brought out by the defendant himself.

The cross examination of some of defendant's witnesses by counsel for the state is also complained of; but we find no prejudicial error therein.

Defendant produced two witnesses and offered to prove that just before the trouble began at the Hooper house they heard a conversation between deceased and Emma

4. SAME: evidence: threats. Lewis concerning the relations between her and defendant, and of deceased's attitude toward the defendant. The exact offer was as follows: "The defendant now offers to prove, for the purpose of showing the whole of the conversation which took place between Andrew Bleakey and Emma Lewis in the kitchen, or between the kitchen and the dining room, of this witness' (Mrs. Hooper's) house, at whose house the trouble occurred, on the night of July 22, 1911, in which Emma Lewis and

Andrew Bleakey had a conversation wherein Mr. Bleakey said to Emma Lewis to come on and go out with him to the buggy. 'I will take you out there. I am your protector. I will see that you are not hurt. I have as good an autômatic as was ever fired, and I can use it, and will use it, if anybody bothers me. . . .' It is offered for the purpose of showing, or as proof tending to show, that Andrew Bleakey was the aggressor at the time of the controversy between himself and this defendant on the night of July 22, 1911, and it is offered as a threat having been made towards the defendant; but defendant further states that no knowledge of this statement ever came to the defendant at any time before the controversy, resulting in the injury to Andrew Bleakey, between Bleakey and the defendant on that night."

The claim now made is that this testimony amounted to a showing of a threat against the defendant, and, although not communicated to him, was admissible for the purpose of showing who began the affray. Of course, recent uncommunicated threats against a defendant are admissible in cases where a question arises as to who was the aggressor in a difficulty between them, where defendant relies upon self-defense; and the question here is, Did defendant offer to show threats by the deceased? We do not think he did. The offer was not to show threats, but a promise to the Lewis woman of protection if any one should attack or bother them. This is something different from a threat, and at most it was a promise of protection, even to the extent of taking life, if necessary. Only by implication could it be said to be a threat, and if so considered it was a conditional one, indicative only of a promise to defend if attacked. The trial court did not err in excluding the testimony. Had the testimony been material, it might, perhaps, have been received as part of the *res gestae*; but we do not see how it would, in any manner, have strengthened defendant's case.

III. After the testimony was all adduced, defendant's counsel asked the court to send the jury out to view the premises; but this request was denied. In this there was no error of which defendant may complain. The ruling was wholly within the discretion of the trial court. Code, section 5380.

5. SAME:
view of
premises:
discretion.

IV. Complaint is made of an argument made by one of counsel for the state. We have examined such of the argument as is presented by the record, and find nothing therein of which defendant may justly complain. While, perhaps, a little colored, it was based upon what the testimony tended to show; and the trial court did not abuse its discretion in overruling the motion for a new trial based upon misconduct of the attorney. *State v. Johns*, 152 Iowa, 383; *State v. Thomas*, 135 Iowa, 717; *State v. McIntire*, 89 Iowa, 139.

6. SAME:
argument:
misconduct.

Many of the instructions are challenged; but most of the complaints are hypercritical. The instructions are in the usual form in such cases, save for a very few matters, which we shall now consider. In referring to admissions, the court said: "(27) Evidence has been introduced to show the defendant made certain admissions appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker actually did say. *But when such verbal statements are precisely given, and identified by intelligent and reliable witnesses, they are often entitled to great credit.*"

7. SAME:
evidence:
admissions:
instruction.

While not in the exact language of the books, the

italicized portion substantially presents the same thought, and there was no error here. See *Marten v. Town of Algona*, 40 Iowa, 390; *Allen v. Kirk*, 81 Iowa, 670; *State v. Johnson*, 72 Iowa, 393; *State v. Jackson*, 103 Iowa, 702.

Counsel extract from an instruction on self-defense the following: "*There must, however, be actual, urgent danger. Not that the danger, in fact, should exist, but it must be actual and real to the comprehension of the*

8. SAME: self-defense: instruction.

person threatened as a reasonably cautious and prudent person. In such cases the inquiry is, not whether the harm apprehended was *actually intended by the assailant, but was it actual and real to the party apprehending it as a reasonably cautious person?*"

The parts italicized are criticised. The first sentence, standing alone, would be erroneous; but, taken in connection with what follows, and with other instructions upon the same subject, it is perfectly manifest that the trial court did not say, nor would a jury understand, that the danger must, in fact, have been actual and urgent. It was enough, according to the very instruction complained of, that it was actual and urgent to the comprehension of the party assaulted. So considered, there was no error. *State v. Jones*, 125 Iowa, 508; *State v. Collins*, 32 Iowa, 36; *State v. Fraunburg*, 40 Iowa, 555; *State v. Donahoe*, 78 Iowa, 491, and *State v. Shelton*, 64 Iowa, 334, are not in conflict with the rules here announced.

Defendant asked the following instruction: "(3) You are instructed that the defendant was lawfully at the home of Sylvester Hooper, in Buxton, on the night of July 22d,

9. SAME: duty to retreat.

and the morning of July 23, 1911, and had a right to be upon Tenth street at the time in controversy between himself and Andrew Bleakey; and if you find from the evidence as produced on the witness stand that the said Andrew Bleakey made an assault upon the defendant at said time with a buggy whip, or otherwise, the defendant was not required, under the law, to

retreat, but had the right to stand his ground and resist such assault, meeting force with force, and only such a degree of force as appeared to him necessary as a reasonably careful, prudent, and cautious man, under all of the surrounding circumstances, to prevent the said Bleakey from continuing said assault, or from making any further assault upon the defendant."

This announced an incorrect proposition of law, and was properly refused. It is not true that one assaulted by another is not bound to retreat. He may stand his ground when, and only when, it reasonably appears that he could not retreat in safety. *State v. Goering*, 106 Iowa, 639. The correct rule was given by the trial court in its instructions Nos. 28, 29, and 30. An admonitory instruction, given by the trial court, is complained of. Such instructions have frequently been approved. *State v. Richardson*, 137 Iowa, 592, and many recent cases.

The testimony amply supports the verdict, and, finding no prejudicial error, the judgment must be, and it is—*Affirmed.*

SAMUEL KUSHNER, Appellant, v. RALPH ABBOTT, et al.

Banks and banking: NEGOTIABLE INSTRUMENTS: GOOD FAITH PURCHASE: GAMBLING CONTRACTS. A certificate of bank deposit is a negotiable instrument by which the issuing bank obligates itself to pay to the rightful holder the sum named in the certificate; and one acquiring the certificate under a blank indorsement in due course of business for value, before maturity and without notice, is a *bona fide* holder, under the Negotiable Instruments Act.

Appeal from Linn District Court.—HON. W. N. TREICHLER, JUDGE.

WEDNESDAY, OCTOBER 16, 1912.

ACTION in equity to determine the right of plaintiff

to a certificate of deposit issued to him by the Commercial National Bank of Cedar Rapids, and now held by the First National Bank of Iowa City as indorsee for value without notice and in due course. The Commercial National Bank paid the amount of the certificate into court, and the decree of the lower court was that the First National Bank was entitled to the money. The plaintiff appeals.—*Affirmed.*

Redmond & Stewart, and M. D. Porter, for appellant.

Ball & Ball, for appellee.

McCLAIN, C. J.—It appears without controversy in the record that plaintiff, a resident of Cedar Rapids, the holder of a certificate of deposit in the Commercial National Bank of that city, was induced by the defendant Abbott to visit the gambling house of the latter in Iowa City and engage in the playing of poker, in the course of which play the plaintiff lost about \$58, which was all the money he had with him. Thereupon said defendant solicited plaintiff to engage in further games, offering to take his check, but plaintiff proposed to procure, if he could, the money on his certificate, and thereupon indorsed the certificate in blank and delivered it either to defendant or to one Dehner, who was defendant's employee in the gambling house. Another citizen of Cedar Rapids who was present in the house identified plaintiff as the person to whom the certificate was payable. Plaintiff's testimony was that, having delivered the certificate to defendant, he was furnished chips with which to continue playing during the night, and, when the play was discontinued about half past 6 o'clock in the morning, defendant gave plaintiff \$45 as the balance coming to him out of his certificate. Dehner testified, however, that plaintiff solicited him to procure cash for the certificate, which Dehner did by going out and getting some

money from an outsider, whereupon he delivered to the plaintiff \$175 in cash, out of which plaintiff then bought chips from time to time in the progress of the game. The man who had identified plaintiff, testifying as a witness, corroborated Dehner in the statement that the money was delivered to plaintiff before the game was continued. On the next morning, Dehner presented the certificate of deposit bearing plaintiff's blank indorsement to the First National Bank of Iowa City, asking that the amount thereof be paid to him as holder, and at the request of the teller of the bank he added his blank indorsement to that of the plaintiff, whereupon the certificate was delivered and the amount called for was paid over to him.

Plaintiff was not the owner of a specific sum of money which the Cedar Rapids Bank was holding for him as bailee, but he was the owner of a negotiable instrument issued by the Cedar Rapids Bank by which it obligated itself to pay to plaintiff or to the rightful holder of the instrument the sum of money called for. *Mereness v. First National Bank*, 112 Iowa, 11; *Elliott v. Capitol City State Bank*, 128 Iowa 275.

The First National Bank of Iowa City, became the holder of this paper for value before maturity and without notice; for Dehner, being in possession of the paper and claiming it as his own, had apparent title by reasons of the blank indorsement of plaintiff and the bank acquired it in due course of business. The suggestion in argument, supported by citation of some of our cases, that absence of notice of defective title in Dehner, if his title was defective, was not sufficiently made out on the part of the bank's officers, is not supported by the record. The officers of the bank as witnesses practically admitted that Abbott had the reputation of being engaged in gambling, but they denied knowledge of any connection of Dehner with Abbott, and it nowhere appears that they had any notice of any connection of Abbott with any transaction involving the

transfer of the certificate of deposit. It is clear that the bank was not charged with notice of any irregularity in the previous transfer of the instrument. Therefore the First National Bank must be protected as *bona fide* holder (see Negotiable Instruments Act, Code supp. sections 3060-a57-3060-a59), unless its title is affected by the statutory provision (Code, section 4965) that "all promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked or bet, at or upon any game of any kind or any wager, are absolutely void and of no effect." The certificate of deposit itself was not affected by any gambling transaction, and the case of *Alexander v. Hazelrigg*, 123 Ky. 677 (97 S. W. 353), in which it was held that a negotiable note executed in payment of a wager was void under a statutory provision similar to ours, although it had passed into the hands of an innocent purchaser entitled to the protection of the Negotiable Instruments Act, is not in point. We do not find it necessary to determine, therefore, whether the adoption of the Negotiable Instruments Law has modified our prior statute relating to gambling transactions so as to render valid in the hands of an innocent holder a promissory note or other negotiable instruments executed in connection with or in pursuance of a gambling transaction. The case from Kentucky just cited is apparently in conflict with *Wirt v. Stubblefield*, 17 App. D. C. 283, which seems to be a leading case holding that the invalidity of a negotiable instrument executed in a gambling transaction will not defeat the rights of an innocent holder of such instrument. See article on the subject in 72 Cent. Law J. (1911) 264.

We think the evidence shows that Dehner was not, in fact, the agent of Abbott in furnishing to plaintiff the money used by him in continuing the gambling transaction; but, whether he was such agent or not, it appears by pre-

ponderance of the testimony that the money for his certificate of deposit was turned over to him, and that he subsequently used it by his own volition in a further gambling transaction. Plainly the certificate of deposit was not rendered void by the statute above cited, for its consideration was not affected in any way by gaming or wagering. It was in the hands of the plaintiff, an article of property not different in its nature from the sum of money which it represented and which was substituted for it in plaintiff's hands by his transaction with Dehner. It would not be contended that, if this sum of money belonging to plaintiff had been delivered to Abbott himself as the result of a gambling transaction, the plaintiff could follow it into the hands of a bank in which it had been deposited. Indeed, it could not be contended that if a chattel, having no characteristics of negotiability, such as for instance a watch, had been won by Abbott from the plaintiff and sold to a purchaser who took it without knowledge of the circumstances under which Abbott acquired apparent title, plaintiff could recover the chattel from such purchaser. 20 Cyc. 939, 943. There is nothing in the statute above quoted rendering the transfer of money or property lost in gambling void and of no effect in any such way as to defeat the rights of an innocent transferee who takes the property without knowledge of the gambling transaction in pursuance of which it was turned over or delivered. Of course, in one sense, the transfer of a chattel is a contract, but, after the transfer is completed by delivery, the rights of the transferee are not dependent on the validity of the contract itself, but are determined by considerations relating to his acquired title to the property. As we said in *Dee v. Sears-Nattinger Automobile Co.*, 141 Iowa, 610: "After property has been delivered to the successful party in consequence of a bet or wager, it is too late for another party to the transaction to attempt rescission or raise the question of its legality." The Cedar Rapids Bank was

practically in the same situation as the bailee of the automobile in the case just cited, and became bound to pay the money in its hands represented by the certificate of deposit to the lawful holder of such certificate.

The decree of the trial court is therefore—*Affirmed.*

STATE OF IOWA, Appellee, v. MIKE SULLIVAN, JOHN RAY
and JOE WILSON, Appellants.

Burglary: INSUFFICIENT EVIDENCE. A verdict of guilty in a criminal case will not be upheld when against the clear weight of the evidence. In this prosecution for burglary the evidence is held insufficient to support conviction.

Appeal from Mahaska District Court.—HON. B. W.
PRESTON, Judge.

WEDNESDAY, OCTOBER 16, 1912.

THE defendants were jointly indicted for burglary. There was a verdict and judgment of conviction and they appeal.—*Reversed.*

Dan Davis and McCoy & McCoy, for appellants.

George Cosson, Attorney General, for the State.

EVANS, J.—It is the contention of the state that on September 11, 1911, a powder house, located about two and one-half miles from Oskaloosa, was broken and entered, and that a box of dynamite was stolen therefrom. The three defendants were discovered in a box car at the Iowa Central Yards at Oskaloosa on the morning of October 4, 1911. They were arrested and charged with the crime. Various circumstances were relied on as connecting them

therewith. A few days after the alleged burglary, one Scoles found a box containing some sticks of dynamite, apparently concealed, at a distance of about three hundred yards from the powder house. On the morning of October 4th he saw five men in the near vicinity of the concealed dynamite. He heard a part of their conversation which indicated their character as burglars. One of them took some or all of the sticks of dynamite contained in the box and wrapped them in a blanket and carried them for some distance up the railroad track and laid them down and left them. He identified the defendants as being three of the five men he saw at such time and place. The defendants were arrested about eight o'clock in the morning in a box car, which they had apparently occupied during the night. Neither dynamite nor weapons were found upon their persons, nor about the car. They had a few coins of money and an abundance of intoxicating liquor, and all were intoxicated. They were tramps, and two of them were seriously crippled. They all testified and gave consistent accounts of their whereabouts on September 11th, and from such date down to the time of their arrest. They claimed to have come into Oskaloosa the night before, and to have occupied the box car for their sleeping place, and denied that they had been in the neighborhood where Scoles claimed to have seen them on October 4th. The state's case rests wholly upon circumstantial evidence, and the circumstances thus put forth are of a very unsatisfactory and inconclusive kind. To add to the difficulty, the evidence of the *corpus delicti* is fatally weak. This was proved by the testimony of the witness Vermillion alone. We set out herewith substantially his entire testimony, omitting objections and rulings:

I have lived in Oskaloosa about twenty years. Own a powder house, which is located about two and one-half miles southwest from town. I keep dynamite caps and sporting powder and mine powder in this powder house. The pow-

der house was broken into some time during the fall. The lock was broken off. I did not know until the 11th or 12th of September that it had been broken into. I made a check of the dynamite, and found a twenty-five pound box of forty percent dynamite short. I was not certain as to the check then for a long time. I had not made any check on the caps at all. There was a horse blanket in the powder house. Exhibit A and B is a part of the blanket that was in the powder house at the time. Q. What would you say as to the box? Are you then certain that was similar to the box taken out of your powder house? A. I could not say if that is the box. It is the same kind of dynamite. The box is similar to the one that was taken out. It is a twenty-five pound box. I own the powder house. It goes under the name of the Oskaloosa Powder Company. It was a Yale lock on the house at the time. I took the broken lock to Art Walls. Exhibit D, I think, is a piece of the blanket. I would not be able to identify the dynamite or any broken box that way. I could not tell forty percent from 60 percent dynamite, because I sell it all in boxes. I could identify the caps as being the same as I handled. Exhibit E is a box similar to the ones I handle. I first learned that the powder house was broken into on Monday. My teams were out there last on Friday, and the next Monday, I think it was, that Hamilton's man was out there, and he notified me that my lock was broken, and I went out myself and took two new locks.

(Cross-examination): I think it was the 11th or 12th of September that the powder house was broken open. I don't know anything about who broke open the powder house, nor anything about that. I offered a reward of \$50 for the parties that broke in the house. I think both of the locks have been tampered with since I put them on after 11th or 12th of September. I couldn't state the date. Hamilton & Hamilton handle the same kind of dynamite and caps. I sell it wholesale and retail. One can get this same kind of dynamite most anywhere. I never checked up the caps. I have been off on my checking of the caps, and can't say whether I am short on caps or not. There was a twenty-five pound box of dynamite short. I send people out there to get dynamite, and wouldn't know how much they took until I made a check of it. I missed this

twenty-five pound box after my last checking. I do not know when it was taken out, or how. I do not know anything about that.

(Redirect examination): If any dynamite goes out of there, I would keep a check on it.

(Recross-examination): If the man I sent out after the dynamite did steal it, or make a mistake, I wouldn't know anything about it. I check it as it is brought by my office.

Some slight additions are made to the foregoing by appellee's amended abstract. It will be noted from the foregoing that this witness testified to nothing of his own personal knowledge that tended to prove a burglary, unless it be the fact of the discovery of the broken lock. No witness testified who professed to know anything about the condition of the building before or after the alleged burglary. The same must be said of the alleged larceny of the box of dynamite from the building. Both the entry and the larceny were assumed as a mere inference, and no competent witness was called to testify to any fact in proof thereof.

If this feature of the record could be overlooked, the question would still remain whether the circumstances proved were sufficient to connect the defendants with the burglary. Giving full credence to the evidence of Scoles (and some of it impresses us as incredible), we think it was clearly insufficient to warrant a conviction of these defendants for the alleged burglary on September 11th. It appears from the evidence of the state that considerable dynamite was found by different persons in different places a mile or two remote from each other. All of these discoveries were made after the arrest of these defendants, except the one made by Scoles. If the finding of dynamite in the month of October was evidence of the burglary of September 11th, then many persons came under the cloud. Granting that these circumstances were fairly admissible as circumstantial evidence, they were nevertheless far from

sufficient, of themselves, to make a case. We can not set out the evidence herein without prolonging this opinion to an undue length. It must be sufficient to say that we have read and reread the record with great care, and find the evidence insufficient to justify a conviction. We have frequently held that we will not support a verdict in a criminal case if it be against the clear weight of the evidence. *State v. Wise*, 83 Iowa, 596; *State v. Billings*, 81 Iowa, 99; *State v. Campbell*, 69 Iowa, 556; *State v. Moffitt*, 31 Iowa 316; *State v. Woolsey*, 30 Iowa, 251. In our opinion, the record before us presents such a case. In view of this conclusion, we need not consider other specific questions presented and argued.

The judgment of conviction must be—*Reversed*.

FREDERICK KNEEBS, Appellee, v. CITY OF SIOUX CITY, et al., Appellants.

Municipal corporations: ASSESSMENT OF ABUTTING PROPERTY: WHAT PROPERTY ASSESSABLE. The statutes relating to the assessment of property for a street pavement contemplate that only that part of a lot or parcel of land actually abutting upon the street shall be assessed for the improvement: So that where a portion of a lot is separated from the street by another portion of the same lot owned by a different person, the separated portion is not assessable, though owned by the person owning that part contiguous to the street, and although the same lies within 150 feet of the street.

Appeal from Woodbury District Court.—HON. F. R. GAYNOR, JUDGE.

WEDNESDAY, OCTOBER 16, 1912.

A writ of certiorari was issued by the district court to the defendants. Judgment was entered annulling an

assessment of plaintiff's property. Defendants appeal.—*Affirmed.*

F. E. Gill, for appellants.

E. J. Stason, for appellee.

LADD, J.—Lot 1 of block 33 in Sioux City is forty-two feet wide and one hundred and fifty feet long, extending east and west, with Riverside avenue on the north. A strip of this lot along said avenue, sixteen feet wide at one end and ten feet wide at the other, belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was used by it as a part of its right of way. The remainder of the lot was the property of the plaintiff, and he had never had any interest in that portion owned by the railway company.

In March, 1911, the city council of Sioux City adopted the necessary resolution of necessity, and by proceedings, the regularity of which is not questioned, caused Riverside avenue to be paved and the portion of the lot owned by the plaintiff to be assessed for the proportionate share of the cost. The plaintiff contends that his portion of the lot, as it did not abut the street, was not subject to assessment for the costs of the improvement, while the defendants insist that the lot is a unit for assessment purposes, and that, even though the title to separate portions be owned by different persons, all of it within one hundred and fifty feet of the street line is assessable for the proportionate share of the cost of the pavement.

This is the only question presented, and its determination necessarily depends upon the construction given the statutes bearing on the subject. These, as argued by counsel for defendant, are directed to the property rather than the owners. But it does not follow from this that a lot or parcel of ground once abutting on a street continues to be a

unit for assessment purposes, notwithstanding subdivisions which may subsequently occur in good faith and in the ordinary uses of the property. It is the property abutting the street, and not necessarily the lot or parcel of land according to some plat, which is made subject to assessment. Section 792 of the Code declares that "cities shall have the power . . . to assess the cost on abutting property." Section 816 provides that the lien for special taxes "for street improvements in case of abutting property shall not cover to exceed one hundred and fifty feet in depth from the abutting line." Section 817: "The cost of any street improvement at the intersection of a street . . . may be assessed against the property abutting or fronting upon that portion of the street, highway, avenue or alley so improved in proportion to the linear front feet fronting or abutting upon such improvement." Section 818 provides that the cost of making or reconstructing street improvements is a "special tax against the property abutting thereon in proportion to the number of linear front feet of each parcel so abutting." Section 820: "When the making of any street improvement . . . shall have been completed . . . the council shall ascertain what portion of such costs shall be . . . assessable upon abutting property." Section 821 provides that "in assessing that part of the cost of the making or reconstructing of any street improvement . . . which is assessable against lots or parcels of ground abutting thereon . . . the council . . . shall cause to be prepared a plat of the street, showing the separate lots or parcels of ground, or specified portions thereof, subject to assessment for such improvement, the names of the owners thereof, as far as practicable, and the amount to be assessed against each lot or parcel of ground." Section 825 directs that "the special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time . . . against the property abutting on such street improvement."

The terms "property" in its appropriate sense means that dominion or definite right of user and disposition which one may lawfully exercise over particular things or subjects, but in these statutes it evidently has reference to the *res* or subject of property. See *South Park Commissioners v. C. B. & Q. Ry.*, 107 Ill. 105: It is abutting property when there is no intervening land between it and the street. *Millan v. City of Chariton*, 145 Iowa, 648. See 1 Page & Jones on Taxation by Assessment, section 620. The properties lying contiguous to the street improved, whether specifically outlined on a plat or not, are to be assessed for the expenses of the improvement. Such properties may be lots or only parts thereof, or portions of blocks or unplatted tracts. As said in the authority last cited: "If a platted lot has been divided in actual use into two distinct tracts, any of which is separated from the street by the other, the one in the rear is not regarded as abutting on the improvement." This is for the reason that ordinarily property not abutting is not especially benefitted thereby. *Langlois v. Cameron*, 201 Ill. 301 (66 N. E. 332), is directly in point, holding that, where lots are divided somewhat as in the case at bar, the portions back from the street are not assessable. In *Eagle Mfg. Co. v. City of Davenport*, 101 Iowa, 493, a portion of the block, less than one hundred and fifty feet wide, had been sold and the land beyond it was held not to be assessable for the improvement of the street. In *Smith v. Des Moines*, 106 Iowa, 590, the strip intervening between plaintiff's property and the street was another lot, and, because of it intervening between, his lots were held not to be liable for the special tax. In *Rawson v. Des Moines*, 133 Iowa, 514, the point was not involved, nor was it in *Stutsman v. Burlington*, 127 Iowa, 563.

Neither lot nor parcel is mentioned in the statutes, except in connection with assessing or levying the special tax. In section 818 this is to be apportioned according to

the "linear front feet of each parcel so abutting," and in section 821 the plat is required to show "the separate lots or parcels of ground or specified portions thereof subject to assessment for such improvement, the names of the owners, as far as practicable, and the amount to be assessed against each lot or parcel of ground," but under section 825 the assessments are to be levied "against the property abutting on such street improvement." This has reference to the time the improvement is made and manifestly the particular property then abutting is intended. Ordinarily this is platted into lots, but in the necessities of use these may be subdivided or blocks or unplatted tracts may abut the street improved, and for this reason the levy against "separate lots or parcels of ground or specified portions thereof" is exacted. Now, "parcel" is defined by Webster's Dictionary as "a part; portion; piece; as a certain piece of land is part and parcel of another piece." The Century Dictionary defines it as "a part, either taken separately or belonging to a whole." So that "parcel" may quite as well be applied to a part or subdivision of a lot as to some portion of a block or tract of other description. The manifest intention is that the levy shall be made according to the subdivisions into which the abutting land has been divided and the separate properties, abutting the street, only shall be assessed. Statutes authorizing special assessments are to be strictly construed. *Smith v. Des Moines, supra*, and *Gill v. Patton*, 118 Iowa, 89. And, if this is done, there is no escape from the conclusion that the plaintiff's portion of the lot, as it did not abut the street improved, was not assessable for any part of the costs of the pavement.—*Affirmed*.

P. W. MOIR, Appellee, v. JOHN BOURKE, Appellant.

Justices of the peace: SUBMISSION OF CAUSE: CONTINUANCE: JURISDICTION. Where a justice court took a case under advisement at the close of the evidence, the parties agreeing to make their argument in the form of written briefs to be filed later, there was not a final submission at the time the case was taken under advisement, so as to require the entry of judgment within three days thereafter, but rather a postponement until the filing of briefs: Nor did the justice lose jurisdiction on the ground of an indefinite adjournment, as it was competent for the parties to agree to a continuance to a time to be fixed by the justice.

Appeal from Plymouth District Court.—HON. DAVID MOULD, JUDGE.

THURSDAY, OCTOBER 17, 1912.

T. M. Zink, for appellant.

Sammis & Bradley, for appellee.

EVANS, J.—We quote from appellant's brief the following sufficient statement of the case:

The appellee began his action before M. B. Tritz, a justice of the peace, to recover judgment against the appellant for the sum of \$20 for the services of a stallion. The parties appeared before said justice, where a trial was had, and what is named a judgment was rendered by said justice against the appellant for the sum claimed and interest and costs. The record of the justice of the peace, which is all there is in this action, shows that the trial was had on the 5th day of August, 1911, and that the following entries were made by the justice on his docket, to wit: 'On this 5th day of August, 1911, this cause coming on for hearing, both parties will appear with their attorneys. Defendant

denies allegations in suit. Evidence introduced by both parties and the attorneys on both sides agree to file a brief in said cause, and the court took the cause under advisement. August 7, 1911, plaintiff's attorney files brief. August 12, 1911, defendant's attorney files brief. August 12, 1911, after hearing the evidence and examining the brief of both parties and the court being advised in the premises, it is ordered and adjudged by the court that the plaintiff have and recover of the defendant judgment for the sum \$20 with 6 percent interest per annum from date, together with the costs of this action taxed at \$19.35.' The appellant sued out a writ of error from the district court on the ground that the justice did not render judgment within three days as required by the statute. Return was made by the justice, and the district court dismissed the writ of error, saving exceptions to the appellant, from which judgment appellant brings this appeal by virtue of a certificate of the trial judge duly certified, signed, and filed.

The specification of error set out in the affidavit for a writ of error to the justice of the peace is as follows: "and the said justice of the peace did not render or enter judgment in said action within three days from the date of submission of said action to him for final decision and judgment as required by section 4522 of the Code of Iowa, and did not render judgment therein until August 12, 1911." Section 4522 of the Code is as follows: "Judgment Entered. In cases of dismissal, or of judgment by confession or on the verdict of the jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, it shall be done within *three days after the cause is submitted to the justice for final action.*"

The question, therefore, presented to us by the affidavit for writ of error and the return thereto is whether the cause was "submitted to the justice for final action" on August 5, 1911. The contention of appellant is that the words "the court took the cause under advisement" should be peremptorily construed as the equivalent of a submission

"for final action." The entire record must be construed together. It is made to appear therefrom that all the evidence was heard on August 5th. It is also made to appear that neither party waived his argument. It is further made to appear that both parties agreed to make their argument in the form of written briefs to be filed later. It would seem clear, therefore, that the cause was not submitted "for final action" that day. Either party could have insisted upon a definite date to be fixed for the submission of the case, but this was not done. It is doubtless true also that either party, upon notice at least, could have come in at a later date and insisted upon an immediate argument and a final submission of the case, but this was not done.

It is argued by appellant that, if the action of the court on August 5th was not a submission, then it was an adjournment of the case for an indefinite time, and that it lost jurisdiction thereby. Authorities are cited, but they do not quite reach the point. This specification of error is not contained in the affidavit for a writ, and it may be that it is beyond our jurisdiction to consider it for that reason. It is sufficient, however, to say that it was expressly held in *Gilman v. Weiser*, 140 Iowa, 556, that "the parties may agree upon a longer continuance or even an indefinite continuance subject to a proper notice of the time of the trial to be subsequently fixed by the justice." See, also, *Cedar Rapids v. Rall*, 115 Iowa, 335. The case of *Iowa Telephone Co. v. Boylan*, 86 Iowa, 92, cited by appellant, did not involve an adjournment by agreement. A fair interpretation of the record before us discloses an agreement to postpone the submission "for final action" until after the filing of briefs by the respective parties.

The judgment of the trial court is therefore—*Affirmed*.

DELLA J. WESTFALL, Appellant, v. BEDFORD LODGE No. 91, I. O. O. F. Appellee.

Benefit insurance: ACTION TO RECOVER SICK BENEFITS: EVIDENCE. In this action for the recovery of sick benefits under by-laws of the order providing that it should pay no benefits for sickness or disability originating while a member was in arrears, or within thirty days after payment of such arrears, the evidence is held to show that deceased had recovered from a disease commencing while he was in arrears, and that another disease from which he died originated more than thirty days after payment of his arrearages. It is also held that in the absence of evidence to that effect no presumption arose that the latter disease resulted from or was in any way connected with the former.

Appeal from Taylor District Court.—HON. H. K. EVANS, JUDGE.

THURSDAY, OCTOBER 17, 1912.

A SUIT in equity to require defendant to assess its members to provide a fund from which to pay benefits to which plaintiff is entitled, and for judgment therefor. The petition was dismissed, and plaintiff appeals.—*Reversed.*

Wm. M. Jackson, for appellant.

W. R. Brant, for appellee.

LADD, J.—R. B. Westfall became a member of Bedford Lodge No. 91, I. O. O. F., October 17, 1902. He died March 21, 1910. Article 61 of its constitution provided that: "Every member of this lodge who has been a contributing member thereof for six months, shall if he be by sickness or accident disabled or prevented from follow-

ing his ordinary avocation, so as to earn a living by the same, or at any other work which he can do, and if his disability is not caused by intemperance or other immoral conduct, receive for each full week of his disability the weekly benefit provided by the by-laws as herein directed." Section 62 authorized the lodge to provide for the funeral expenses of a member in good standing at the time of his death. Section 1 of the by-laws fixed the indemnity to be paid under article 61, and section 3 the expense under article 62, as follows:

Section 1: "If a member of the third degree, \$4.00 per week for twenty-six weeks; \$3.00 per week for thirteen weeks; \$2.00 per week for thirteen weeks and one dollar per week thereafter during the continuance of the illness."

Section 3: "On the death of a brother of this lodge who was while living entitled to benefits, \$60 shall be appropriated to defray his funeral expenses, which shall immediately be paid over to some relative authorized to receive the same."

"Good standing" is defined by section 6 to be: "Not three months in arrears for dues, fines or assessments, and thirty days shall have elapsed after full payment of all dues and fines to date for such payment, and the member shall be clear from all penal charges on the books of the lodge."

Unless suspended as hereinafter explained, plaintiff was entitled to benefits and funeral expenses, and to recover the same is the object of this action.

The dues payable to defendant amounted to one dollar every three months, and decedent, while delinquent from October 1, 1908, to January 1, 1909, was taken sick with pneumonia, and, under article 58 of the constitution, was not entitled to benefits during sickness originating while in arrears. That article reads: "Whenever a member shall become indebted to the lodge for three months or more of dues, he shall, by reason of such indebtedness, without notice

or further proceeding, stand suspended from all pecuniary benefits until his indebtedness shall be fully paid, and for one month thereafter, and during the entire continuance of any sickness or disability which commenced or originated while said member was thus in arrears, or which commenced or originated during the thirty days succeeding payment of such arrearage. The term 'pecuniary benefits' herein used shall contain and include funeral benefits and funeral expenses."

On May 31, 1909, dues to October 1st of that year were remitted from Ames, Iowa, where decedent then lived, to the defendant at Bedford, and the check was marked "paid" by the bank at Ames June 3d. It is fair to assume that the dues reached defendant June 1st or 2d.

Two questions of fact arise: (1) Did decedent recover from his illness, which commenced in May, 1909; and (2) if he did, did the sickness resulting in his death originate within thirty days after the payment of the dues, as stated above?

The testimony of but two witnesses bears on these issues. The plaintiff, who is the widow of the decedent, testified as follows: "Q. Now, did he recover from that sickness? A. The doctor said so. Q. What did you say? A. We all thought so. . . . Q. And so far as you know and your medical advice extended, he recovered from that sickness? A. Yes, sir. Q. When did he recover and go to work? A. He never got able to go to work. He was going to work on the following Monday, and he took sick on Sunday again. Q. Well, what is the date that he recovered from his first sickness and got able to go to work, as he supposed? Give the court that date. A. I never thought of anything like this coming up and never paid any attention. . . . He must have recovered about the 1st of June, I should think. He recovered from pneumonia the latter part of June, I think. He took a new attack in about two weeks after he had recovered from the first

attack. In about two weeks he was seized with another attack. The last proved fatal."

On cross-examination she continued: "I don't know just what time he was taken sick. I could not say, because I never thought of anything like this coming up. I never paid any attention to it. From the time he first took sick, about June 2, 1909, he was never able to work. . . . He wasn't able to work; but before Monday came he took sick with this other disease, and never was able to work. Practically during all the time from June 2, 1909, up until his death he was entitled to benefits from the lodge, as claimed in the petition."

Upon being recalled, she testified that: "After June 2d he recovered from his pneumonia, about the 4th of July. He went home about the 7th of July, and was up and around, and the doctor thought he would be able to go to work the following Monday. After recovering from the pneumonia, he took a new complication of diseases, and from that he died—lingered and died."

The other witness was the father of plaintiff, who testified that he knew of decedent's illness, and further: "I went up there and stayed until he got up and around. He got up and around about the middle of June, I think. . . . I think I went up there about the 10th of June. Q. Did he recover from that illness? A. He got up and around, and the doctor told him he could go to work. . . . He was going to work, and got up and around and could go a couple of blocks, and we concluded that he was well enough, and we could come home. I concluded he had recovered from this attack of pneumonia. The doctor said he had, and all he wanted was a little rest. After that, in two or three weeks, he had a relapse, and was in a worse fix than he was the first time. This last sickness proved fatal, and he died. The doctor said it was nervous prostration and stomach trouble. That was a different disease than what I found him afflicted with in the first instance."

From this evidence no conclusion can well be drawn other than that decedent recovered from the attack of pneumonia. Both witnesses so testified, and also the attending physician had expressed a like opinion. This last may have been hearsay; but it went in without objection. His customary strength may not have been fully restored, and rest have been essential; but this does not negative the conclusion that from the particular sickness, i. e. pneumonia, which had commenced in May, he had recovered. There was no evidence to the contrary; nor was there any evidence indicating that either neurasthenia or the stomach trouble, with which he was subsequently afflicted, was the consequence of or in any wise connected with his previous malady, and this ought not to be assumed. According to plaintiff, he recovered in the latter part of June or forepart of July. She fixed July 7th as the date when he went home, and the Sunday following as the date when he was taken sick again. This would be more than thirty days after June 1st or 2d, when the arrears were paid. The other witness fixed the time of his recovery at about the middle of June, and he was taken sick again about two or three weeks afterwards. His testimony is not inconsistent with that of plaintiff, nor with the finding that the decedents last illness commenced after July 2d, and therefore more than thirty days subsequent to the payment of the dues which had matured. To hold otherwise the plaintiff's testimony must be rejected; and as the credibility of neither witness was assailed we are inclined to reach a conclusion in harmony with all the evidence adduced. Moreover, the certificate of two physicians who attended decedent have found their way into the record, and therefrom it appears that one of these treated him for pneumonia from May 18th to June 8th, and from the other that he first treated him for neurasthenia August 1st. These, if considered, tend to confirm the conclusion reached, that decedent recovered from pneumonia, and that neurasthenia

and stomach trouble did not originate within thirty days after the payment of the dues June 1 or 2, 1909. If it be suggested that one of these diseases was of slow development, and possibly originated even prior to the period of arrears, it is to be said that of this no evidence was adduced.

Relying upon the evidence, as we must, the conclusion necessarily follows that the sickness of decedent which resulted in death began more than thirty days after the payment of arrears. From that time he was sick thirty-six weeks, and under the schedule of the lodge was entitled to benefits amounting to \$134 and \$60 as funeral expenses. Of this, \$35 has been paid, leaving \$159 to which plaintiff, as widow of decedent, is entitled.—*Reversed.*

M. JACKMAN AND OTHERS, Appellees, v. THE BOARD OF SUPERVISORS OF BLACKHAWK COUNTY, 'IOWA, AND OTHERS, Appellants.

Intoxicating liquors: CANVASS OF CONSENT: PUBLICATION OF NOTICE.

- 1 The statutes requiring the publication of notice for the canvass of a petition of consent to the sale of intoxicating liquors in the official newspapers of the county, was satisfied by publication in the papers treated and recognized as the official papers for the year, although the record of the supervisors failed to show the reappointment or selection of such papers.

Same: FILING OF POLL LIST: JURISDICTION. The poll books of the

- 2 last city election by which the sufficiency of the signatures to a petition of consent to the sale of liquor is to be determined are those filed with the county auditor, the existence of which and the filing of the same in compliance with the statute are jurisdictional. So that where a poll book was not filed within the statutory time and before the canvass of the petition of consent, neither the supervisors nor the court on appeal had jurisdiction to act on the petition; and the subsequent authentication of the poll book was not sufficient to confer jurisdiction.

Same: VERIFICATION OF SIGNATURES: REPUTABLE PERSON. A person

3 who has been convicted of violating the liquor laws, with no evidence by the party having the burden of showing his reputable character, that since such conviction he has been engaged in a lawful business, is not qualified as a reputable person to verify the signatures to a petition of consent to the sale of liquor, within the meaning of the statute requiring the same to be so verified.

Same: JURISDICTIONAL FACTS: BURDEN OF PROOF. The statutory qualifications required of signers to a petition of consent and of the persons verifying the same are jurisdictional matters; and where the contestants put their qualification in issue the parties inaugurating the proceedings have the burden of establishing the jurisdictional facts, at least to the extent of making a *prima facie* case.

Same: PETITION: VERIFICATION OF SIGNATURES. Where a party verifying the signatures to a petition of consent admitted changing names on the petition to make them conform to the poll lists, and was unable to point out the names so changed, the petition verified by him was not in compliance with the statute.

Same: CANVASS OF PETITION: REVIEW ON APPEAL. Where neither the board of supervisors nor the district court in canvassing a petition of consent made a schedule of the individual names admitted or rejected, the Supreme Court can not review the proceedings with respect to the disputed identity of names with any degree of certainty or satisfaction.

Appeal from Blackhawk District Court.—HON. C. E. RANSIER, JUDGE.

THURSDAY, OCTOBER 17, 1912.

A PETITION of general consent for the sale of intoxicating liquors in the city of Waterloo under the provisions of the mulct act having been presented to the board of supervisors was canvassed, and found insufficient. From this finding plaintiffs herein appealed to the district court. Upon trial of said appeal the petition was found to have been signed by the requisite number of voters, showing a majority of 59 names after deducting signatures subject to proper objection, and the order entered by the board of

supervisors was reversed. From the judgment so entered the defendants appeal to this court.—*Reversed and remanded.*

Reed & Tuthill and Courtwright & Arbuckle, for appellants.

W. N. Birdsall, J. T. Sullivan, H. B. Boies, and *C. W. Mullan*, for appellees.

WEAVER, J.—The insufficiency of the petition of consent was contested on several grounds, which, so far as they affect this appeal, may be stated as follows: (1) That no legal notice of the canvass of the petition was given by the board. (2) That some of the poll books or poll lists by which the petition must be tested were not properly certified or identified as required by law, nor had they been preserved or kept by the proper custodian. (3) That a large proportion of the signatures appearing upon the petition were never verified by the affidavits of reputable persons as required by law. (4) That a large number of the names subscribed to the petition are neither actually nor substantially identical with the alleged corresponding names upon the poll lists.

I. The objection to the notice given for the canvass of the petition is that the statute requires its publication for a given length of time in the official newspapers of the county. It was, in fact, published for the required period in three newspapers of the county, but the evidence tends to show that, while these journals had been selected as official newspapers for the preceding year, no selection had, in fact, been made for the year in which the petition was canvassed, or, if made, no record entry of such selection had been preserved. It does appear, however, that such papers had been treated and recognized as “official” during the

1. INTOXICATING
LIQUORS: can-
vass of con-
sent: publica-
tion of notice.

year in question. There is also some rather indefinite oral testimony tending to show that their selection had been voted by the board and record thereof inadvertently omitted. But, whether voted or not, we think the fact that these papers and none other in the county were at that time recognized and used as the official papers of the county is sufficient to justify the publication of this notice therein, and that the lack of a record showing this reappointment or selection is not fatal to the jurisdiction of the board of supervisors to consider the petition. *City v. Scudder*, 41 Wash. 15 (82 Pac. 1022); *De Board v. Williams*, 155 Iowa, 149.

II. While the objection to the authenticity of the poll books was raised as to several different precincts, it was waived or abandoned by appellants as to all except the books purporting to contain poll lists from the Second precinct of the Third ward of the city. The election upon which the appellees claim to base their petition is the regular city election held on March 28, 1910. The canvass of the petition was begun on September 15, 1910. The appeal from the finding made by the board was tried at the February, 1911, term of the district court. By the law of this state municipal elections are held according to the regulations enacted for the conduct of general elections (Code, section 642). It is made the duty of the election board in each precinct to enter in each poll book a list of the persons voting and a written return or certificate showing the number of votes cast, and for whom cast, which return is to be signed by the judges and clerks. Code, section 1144. Two such books shall be made and certified, and, in the case of a city election, one of such books must within two days be delivered by one of the judges to the county auditor, and the other shall be delivered by one of the judges to the city clerk. In each instance the receiving officer shall file such book and preserve it for eighteen months, or until the settle-

2. SAME: filing
of poll list:
jurisdiction.

ment of any pending contest of such election. Code, section 1145. To comply with the conditions of the mulct statute in a city of more than 5,000 inhabitants, the petition of general consent must be signed by a majority of the voters residing in the city and voting therein at the last city election as shown by the poll books. Code Supp. 1907, section 2448. The poll books by which the sufficiency of the signatures to the petition are to be determined are those filed with the county auditor, and not those retained by the local officer. *De Board v. Williams, supra.*

The petition of consent in this case was filed with the county auditor on August 10, 1910, and, as already stated, the hearing thereon before the board of supervisors was begun on September 15, 1910. Up to that time the poll books of the Second precinct of the Third ward of the city of Waterloo had never been certified or returned by the election board as required by law, nor had either copy thereof ever been delivered or filed with the county auditor. During the hearing before the supervisors, said books were brought in and admitted subject to the objections of the contestants on the grounds above indicated. One set of these books was then marked with the word "Auditor," and left in the custody of that official, and the other was retained by the city clerk, but neither book bears any filing mark indicating that it was never filed in either office. As we understand the record, the board of supervisors regarded the objection to the poll books from said precinct as fatal, and rejected the names of the petitioners whose qualifications depended thereon. On the trial of the appeal in the district court the petitioners brought in as witnesses the persons who had acted as judges and clerks of election for said precinct at the election of March 28, 1910, who testified, in substance, that the books had been left uncertified and undelivered to the auditor through oversight; that upon present inspection they discovered no changes in said books since the record made by them on the day of said election;

that they did not know where the books had been kept, but each said, in substance, that "assuming the poll books have been in the custody of the proper parties and that no changes have been made, and that they are now in the same condition that they were, so far as the contents are concerned, at the time they were delivered to the clerk," he would be willing now to sign the proper certificate. Pending the ruling upon the appellant's objection to these books, the witnesses who had served as members of the election board of said precinct appear to have been permitted to sign a certificate which was attached to said books, stating in the usual form the number of votes cast at such election and for whom cast, adding thereto the further statement that "this certificate is made for the purpose of correcting the omission by oversight to fully certify to the return of said election on the poll lists before returning the same." The appellant's objections were thereupon overruled, and the poll lists thus attested were admitted in evidence and the lists given effect as being sufficiently authenticated. The names of voters upon such lists number 640.

The question raised by the appellant's objection at this point is a serious one, and it is not fully met by any of the authorities to which we are cited by the appellees. The decision in *Wilson v. Bohstedt*, 135 Iowa, 453, which is relied upon by the appellees, does not seem to be controlling. The question we have here to consider was not in that case. The objection there passed upon did not deny that the poll books had been duly certified and returned to the proper officer, but was based upon the claims that the said lists had been taken temporarily from the auditor's office for examination by persons interested in supporting or opposing the petition, and that the competency and value of such records as evidence were thereby destroyed. The point so made was overruled. Here, however, it is to be remembered that at the time the petition of consent was signed four months after the election, and at the time it

was filed, and at the time the board of supervisors entered upon its canvass of the petition six months after said election, there was no certified poll list in existence anywhere of the electors voting thereat in the Second precinct of the Third ward, nor was there any such poll list either certified or uncertified returned to or filed with or in the possession of the county auditor who, as held in the *Oskaloosa* case, 155 Iowa, 149, is the legal custodian of the only list by which a petition of consent is to be tested. Other precedents called to our attention are election cases and it is only in a very indirect aspect that they can be said to offer any help in disposing of this appeal. We do not, and can not, inquire into the election of March 28, 1910. We have to accept that election as an accomplished fact, and to look to a certain designated record (if there be one) of said election as furnishing the only test or standard of comparison in determining the identity and names of voters who are entitled to be heard in the matter of a petition of consent. The existence of such a record is jurisdictional, and, if it be not produced or in some proper manner supplied, neither the board of supervisors nor the district court on appeal nor this court has any authority to canvass or act upon the petition. When the existence of a jurisdictional fact is challenged by denial, the burden is, of course, upon the proponent or moving party to establish such fact by competent evidence. That challenge was promptly made in this case at the outset of the canvas of the petition, and it developed at once that no poll list of the March election in the precinct in question had ever been presented to or filed with the county auditor, but from the office of the city clerk there was produced two unsigned and uncertified lists purporting to contain the names of the electors voting at said election in said precinct. So far as the record upon this appeal shows, no attempt was made before the board to supply the legal certification of said lists, but upon the appeal to the district court, as we have

already shown, there was oral evidence tending to identify the lists and pending that trial the persons who had acted as an election board in that precinct were permitted to attach a certificate to the books. Now it may be that in any case which turns upon the canvass of any vote cast at an election held according to law the authority of the court to require the amendment or correction *nunc pro tunc* of any record which may be found necessary to give effect to the voice of the majority will continue until all contests of such election are adjudicated. But, in a case where the statute for a wholly collateral purpose designates a particular record of that election as a test or proof of a person's legal qualification to appear as a petitioner in a proceeding before the board of supervisors or other tribunal, the reasons which make proper the rule and practice above mentioned are not so apparent. In an election case it is a matter of fundamental right and public importance that the voter's ballot be counted and counted as cast, and every reasonable rule will be applied to effectuate that end. But, under our statute, the right to be heard upon a petition of consent is not the right of the voter as such, but of those voters only who voted at the preceding election, and whose names are to be found upon the poll list—a list which we have defined and construed to be the one deposited with the county auditor. It will avoid confusion if, in considering this phase of the case before us, we bear in mind the proposition that the list so designated is not a mere matter of evidence by which to discover or point out the electors who voted at the last preceding election, but the existence of such list as the statute requires is an essential element in the qualification of the individual elector to be a petitioner. It follows of logical necessity that, although a voter has voted at the last preceding election, his right to unite in a petition of consent does not mature until the statutory requirement concerning the poll list is complied with, and, if for any reason this is post-

poned or delayed, subsequent compliance can have no retroactive effect to validate a petition or signature which was unauthorized when made. Now, assuming for the purposes of this case the existence of authority in the district court upon the hearing of an appeal from the board of supervisors to consider oral evidence as a substitute for the official certificate required by law to be attached to the poll books, or to permit the certificate to be then made by persons who had acted as judges of an election held nearly a year before, we have still to inquire how such order or ruling affects, if at all, the qualifications of voters at the time they signed the petition or at the time when the petition was submitted to the board for canvass. The petition it will be remembered was signed within thirty days prior to August 10, 1910, the date on which it was filed. The board entered upon the canvass September 15, 1910. Objections to the qualification of the signers to the petition were made at the outset of such canvass. The uncertified lists from the office of the city clerk were then produced, and never until then was a copy left or deposited with the auditor. These lists in the same condition were produced again on the trial of the appeal where a belated certificate was made by the persons who had acted as an election board. Under the mulct statute, the circulation of a petition of consent must be made and completed within thirty days prior to the filing. All papers which the law requires to be filed with the auditor relating to the mulct statute must be kept by him open to inspection by any citizen. Code, section 2453. This requirement we have held applicable to the poll lists. *Wilson v. Bohstedt*, 135 Iowa, 453. After the filing of the petition and notice given of the proposed canvass, it was the right of any citizen of the city to examine it, and, if he believed it insufficient, to contest its canvass before the board of supervisors. This was in fact done by several citizens. For the purpose of that contest, it was quite necessary, or at least

proper, for them to investigate the qualifications of the signers to the petition. This they could effectually do only by reference to the specified record which the statute makes the final test—the poll lists on file with the county auditor. At that time there was no poll list for the Second precinct of the Third ward in the said office, and never had been. Such was the situation when the canvass was begun and the contestant's objections to the petition presented. It follows that the objection was insuperable so far as it applied to signatures of electors who voted in the precinct named. If it can be said, and we will so assume for the purposes of this case, that the subsequent deposit of the uncertified lists with the auditor or the oral testimony given in support of the petition on the trial in the district court, or the certification which was there permitted had the effect to supply the omitted act or record and to qualify from that date the voters in said precinct to become signers of a petition of consent, it is a qualification which, as we have already suggested, is without retroactive effect. The question is not who were qualified signers at the time this contest was submitted to the district court on the trial of the appeal, but rather who of these signers were qualified therefor at the time the petition was filed, or, at the very latest, at the time the canvass was begun, and the contestants appeared to take issue upon the sufficiency of the petition. Up to that moment, we think it must be admitted no voter of the Second precinct of the Third ward was qualified to join in a petition of consent because of the entire absence of the official record which is made an indispensable condition thereof. If the petition was insufficient when filed and offered for canvass, that defect can not be cured by any device short of a new petition in the making and presentation of which the requirements of the statute are fully observed. Concerning the jurisdictional character of the preliminary statutory provisions see quite in point *People v. Wanek*, 241 Ill. 529 (89 N. E. 708).

III. We turn next to the objection that many of the signatures to the petition are not verified by the affidavits of reputable persons as required by law. It appears

3. SAME: verification of signatures: reputable person. . that the signatures to the petition were procured by several different persons, each of whom circulated a copy which he presented to different individual voters, and these papers, when signed, were assembled into one body or petition, each solicitor making affidavit to the effect that the names of the voters severally subscribed thereto were personally signed in his presence by said voters on the day and date set opposite to their several signatures. The lists thus returned and verified by several of said solicitors, and containing the names of several hundred petitioners, are objected to by the contestants on the ground that the record shows that such verifications have not been made by "reputable persons" within the meaning of the statute. In support of this objection, it is shown without dispute that one of said solicitors verifying said petition had been adjudged guilty of violating the liquor laws of the state on five different occasions within the last twenty-five years, that another had been convicted of a like offense in the year 1902, and another had been convicted of maintaining a liquor nuisance in November last preceding the filing of said petition. It was further shown that on April 29, 1910, in the United States District Court, six of said solicitors, including two of the three just mentioned, had been found guilty of violating the federal statutes relating to the sale of intoxicating liquors, and each had been adjudged to suffer imprisonment in jail for the term of sixty days, and to pay a fine of \$100 and costs. It is admitted, however, that a pardon or a remission of the penalties was thereafter procured from the President of the United States. In still other cases it is shown that, after the signatures of certain voters had been procured, it was discovered or believed that the names so signed upon the

petition did not agree with the poll lists. In quite a number of such cases the solicitor, acting as he claims upon the consent or authority of the signers, himself rewrote or changed the signed names to make them correspond with the poll lists. In one instance the change was made upon the authority of a son of a signer, who says, however, that the son's action was approved by him. In some cases there is evidence tending to show that changes were made without the authority or consent of the petitioners. The number of such changes is not definitely ascertained, and the solicitor who was most active in the work of revising the signatures admits his inability to say how many times he exercised that liberty. The statute governing the manner of securing and verifying these petitions makes the signing thereto of the name of another punishable as forgery, and a false statement in the affidavit as perjury, and provides that the document shall be verified upon oath to the effect that the affiant personally witnessed the signing of each name therein. Code, section 2452.

The objections based upon the foregoing conditions of fact require us first to consider and decide whether solicitors who have been convicted upon their own plea of guilty of violating the laws regulating the very business for which they seek the protection of a statutory consent are men who satisfy the requirement of the statute that verification of the petition shall be made by reputable persons. The question of the construction of this particular provision has not been considered by this court, except in the *Oskaloosa case*, 155 Iowa, 149, where it is briefly discussed with reference to facts differing in material respect from those which are here involved. In the case *In re Intoxicating Liquors*, 120 Iowa, 680, the reference to this statute was controlled by a stipulation of the parties which rendered a construction unnecessary. In the case first cited, objection was raised to the verification because six years prior to the making of the affidavit had been convicted of

gambling. It otherwise appeared that for the last three years he had been engaged in a lawful occupation. In refusing to so sustain the objection we said: "The only question before us is whether having been convicted of gambling he is presumed to have been a gambler and the presumption should prevail up to the time of filing the affidavit, notwithstanding the testimony that he had been engaged in a lawful occupation during the three years preceding. The law recognizes that men may repent of their past misconduct and adopt a correct course of life, and we are not inclined to say that the lapse of six years with proof that he had been engaged in lawful occupations during the preceding three years was not sufficient to overcome the inference to be indulged that conditions once established are presumed to continue." In the present case some of the judgments of conviction offered in evidence were at more or less remote dates in the past, but in neither instance is there any evidence of subsequent engagement in lawful business, and in each and every instance a conviction had taken place upon a plea of guilty of violating the law relating to the sale of intoxicating liquors within less than a year prior to the making of the affidavits. If upon such showing without any testimony whatever upon the part of the party having the burden to establish the reputable character of the solicitors we are to overrule the objection raised by the contestants, we, by judicial pronouncement, wipe from the statute the provision which requires that the persons verifying the petitions shall be reputable as effectually as if it had been repealed by express action of the Legislature. The thought of the trial court seems to have been that the words "reputable persons," as here used, are equivalent to "credible persons," and that if such persons are not impeached in some of the methods usually employed for that purpose, or if the court sees no reason to disbelieve the statement in the affidavit,

the purpose of the law is satisfied. But in our judgment this is an erroneous proposition.

A petition signed by voters having a specified qualification and verified by a person having another specified qualification are indispensable conditions to the jurisdiction of the board of supervisors or of the court upon appeal to consider or canvass such petition. Jurisdictional facts will not be presumed, and, where issue is taken upon them, the burden is upon the party inaugurating the proceeding to establish them. A person may be credible as a witness speaking under oath, and yet not be "reputable" within the meaning of the law. The latter word is not confined to a matter of reputation, but implies to some degree a character which is worthy of good repute or entitled to the esteem and respect of good citizens generally. See Century Dictionary; Webster's New International Dictionary; *State v. Chittenden*, 127 Wis. 468 (107 N. W. 500); *Austin v. City*, 48 N. J. Law, 118 (3 Atl. 65); *Lambert v. Stevens*, 29 Neb. 283 (45 N. W. 457). Illustrating to some extent the jurisdictional requirements contained in the statute—the qualification of the petitioner and the qualification of the man who makes the affidavit—is the *Austin* case above cited. The facts there involved were as follows: In the state of New Jersey an applicant for a license to sell intoxicating liquors must be recommended or indorsed by not less than twelve "reputable freeholders" of the city. An applicant presented his petition signed by twelve or more persons each of whom held title to land within the city, and therefore within the letter of the law. A remonstrance being interposed, it was discovered that the petitioners or a large portion of them had been made freeholders by the conveyance of small fractions of a tract of comparatively worthless land, and that such conveyance had been made to and accepted by them for the express purpose of qualifying, such grantees to become sign-

4. SAME: jurisdictional facts: burden of proof.

ers of petitions for liquor licenses. Upon this ground, the remonstrators challenged the standing of the petitioners as "reputable freeholders." They also denied the genuineness of the signatures to the petition. The objections being overruled and license issued, the decision was reversed on certiorari. The court, referring to the objections raised to the application, say: "If the facts stated in the remonstrance are true, they controlled the jurisdiction of that body (the city council), and it was without power to act in the granting of a license." Further speaking upon the construction of the statute, it is said: "There is force in the word 'reputable,' used in our statute, in its application to some of the signers to this petition." The court then proceeds to state the scheme by which these freeholders were given title to land to enable them to act in the capacity of petitioners for licenses, and adds, "persons who will lend themselves to such a scheme are not the reputable freeholders whose certificate will be received by law in any tribunal intrusted with the responsible duty of controlling the sale of intoxicating drinks as a satisfactory recommendation of good repute for honesty and temperance of one who seeks a license." Bearing upon the burden of proof in this class of cases a pertinent precedent found in *Lambert v. Stevens*, 29 Neb. 283 (45 N. W. 457). Under the statute of that state, the applicant for license must present a petition signed by a majority of the resident freeholders. In the cited case a petition was filed, and its granting was opposed by certain remonstrating citizens. The license was granted, and the contestants appealed. The order below was affirmed because the evidence had not been preserved, but in stating the law applicable to such contests the court says: "The petition must be signed by the requisite number of freeholders in order to give the city council jurisdiction of the matter of granting a license. As this is essential to jurisdiction, and as it can not be presumed when a remonstrance is filed denying

that the petition is signed by a majority of the freeholders, it then becomes the duty of the applicant to establish that fact. When the remonstrance denies that any specified petitioner is a freeholder, it is the duty of the applicant to furnish proof of the same." To the same effect is *Goodwin v. Smith*, 72 Ind. 113 (37 Am. Rep. 144).

If the rule of these cases is correct, and we think it can not be doubted, it follows that when the contestants in this case took issue upon the jurisdictional facts, including both the sufficiency of the signatures to the petition and the character of the persons by whom it was verified, the burden rested upon the proponents to establish such facts by at least a *prima facie* showing. This, so far as the latter fact is concerned, they did not attempt to do. Still further bearing upon the question of character which the court may say conforms to the statutory standard, see *Whissen v. Furth*, 73 Ark. 366 (84 S. W. 500, 68 L. R. A. 161); *Bachman v. Town*, 68 N. J. Law, 552 (53 Atl. 620). In the *Whissen* case, where the statute required the holder of a license to be of good moral character, the court was considering an application for license by a man who had been conducting a gambling house with the consent of the city authorities upon paying a monthly fine or license fee for the privilege. He had quit the business, and proposed thereafter to observe the law. Upon the question whether this history disqualified him under the law the court says:

In business affairs the evidence shows him to be upright and honorable, and socially he appears to be popular and highly esteemed, and there is nothing shown against his private character. The evidence shows him to have been a continuous violator of the criminal laws for many years. That the officers condoned these violations only renders them violators of the law also, and did not change the criminality of his acts before the law, however much or little it may have changed it in public opinion. If such a person is entitled to a license under the section

quoted, then the purpose of this legislation is defeated. . . . But counsel urge that the same degree of moral character is not required of a person to conduct a saloon that is required of a superintendent of a Sunday school or a minister of the gospel, and insist that the requirement is fulfilled if the applicant has as good moral character as the other applicants. . . . This argument will not prevail. The law may not expect the same degree of morality for a saloon keeper as a minister, but it does require of each equal obedience to the law. It is thoroughly settled by authority that an habitual violator of the laws, even violations which are only *malum prohibitum*, instead of *malum in se*, is not within the meaning of the statute requiring the applicant to be of good moral character. . . . The mere fact that in the past a person has offended the laws habitually will not prevent him having a character within the statute if the evidence shows a real reformation. This fact, like all other showing of good character, must be established by the applicant.

With reference to the requirement that an applicant for a license must be a person of good moral character, the Indiana court has said that "to be guilty of a public offense is an immorality within the meaning of that word as used in law regulating and licensing the sale of intoxicating liquors." *Groscop v. Rainier*, 111 Ind. 361, (12 N. E. 694). We do not overlook the fact that the last cited case and some others deal with statutes prescribing the qualifications of a dealer to receive a license, while in the case at bar we have to deal with the qualification of the maker of an affidavit which is an essential to the granting of a consent under the protection of which dealers shall have, if not license, at least the right to engage in the traffic without incurring a penalty. But the difference in fact involves no difference in principle. In each case the statute makes it an indispensable requisite to the granting of the license or consent that a designated person connected with the proceedings therefor shall bear a good character and the necessity of complying therewith can not

be dispensed with in either case. Indeed, if either requirement is to be held the more imperative, it must be the one found in our own statute for the requirement there is jurisdictional in its nature. We are of the opinion, therefore, that the objections to the consideration of the names found upon the petitions circulated by the several solicitors to whom we have referred should have been sustained.

We think, also, that the objection raised to some of the other petitions, especially the one or more verified by the solicitor Wilford, should have been sustained. Counsel

5. SAME: petition: verification of signatures.

for appellees concede, as indeed they must, that the act of said solicitor in writing the names of others upon the petition or changing such names as to make them correspond with the poll lists was a clear violation of the law. Possibly (though we do not so decide) if all these unauthorized signatures could be pointed out, thus enabling the canvassing board to eliminate them from the count, this defect might be disregarded, but, as a witness upon the stand said solicitor admits his inability to say how many of the names appearing upon the petition were written by him, and we think his own showing should be held to vitiate the petition which he verified. In disposing of this question we call attention to *In re Veasey*, 6 Pennewill (Del.) 52 (63 Atl. 801), a case decided by the Delaware court. In that state the statute requires that not less than twelve freeholders sign the application for a license, and that each signer must either have read it himself or have had it read to him. An applicant presented a petition signed by thirty-five alleged freeholders. It appeared, however, that six of this number had neither read the petition, nor had it read to them, and this fact was held to constitute a fatal objection, although there were admittedly more than twelve signatures remaining of persons duly qualified. Whether we should be inclined to go to this extent we need not here decide, but it illustrates the strictness with which nearly

all courts are disposed to construe the conditions which the law imposes upon the liquor traffic in the interest of the general public. See, also, last paragraph of opinion in *Ferguson v. Supervisors*, 71 Miss. 524 (14 South. 81); *Wilson v. Hines*, 99 Ky. 221 (35 S. W. 627, 37 S. W. 148); *Grant's Case*, 2 Pa. Co. Ct. R. 87; *Faulkner's Case*, 2 Pa. Co. Ct. R. 86; *Scott v. Naacke*, 144 Iowa, 164; *Covert v. Munson*, 93 Mich. 603 (53 N. W. 733); *Grubbs v. Griffin* (Miss.) 25 South. 663; *Littleton's Case*, 113 App. Div. 471 (99 N. Y. Supp. 417); *Mason v. Ratcliffe*, 27 Ind. App. 290 (60 N. E. 1099); *Pisar v. State*, 56 Neb. 455 (76 N. W. 869). While these cases do not involve facts like those presented in the present case, they are illustrative of the tendency of courts to require strict compliance with the statutory conditions upon the legalizing or licensing of such business.

IV. Concerning the identity of individual signers, the record is too obscure and confused to justify us in prolonging this opinion for a discussion of it. It contains

6. SAME: canvass of petition: review on appeal. no schedule or statement of the individuals whose names were admitted to the count or of those rejected. The appellants seem to have moved or to have asked for a specific statement by the court in this respect, but the application was overruled, and, while the point is not argued, it would seem to have been a reasonable and proper request. Without a showing of that nature this court is unable to review the proceedings below in respect to the disputed identity of names upon the petition with those in the poll lists with any degree of certainty or satisfaction. But the conclusions we have already announced operate to eliminate from the petition more than sufficient signatures to change the result, and require a reversal of the judgment below. The case will, therefore, be remanded to the district court, with directions to enter judgment affirming the finding of the board of supervisors.—*Reversed and Remanded.*

STATE OF IOWA V. FRANK HAUGH, Appellant.

Criminal law: RAPE: INCLUDED OFFENSES: INSTRUCTION. Where the
1 evidence was sufficient to support a conviction for rape, the defendant could not complain that the court permitted the jury to consider the crime of assault with intent to rape, if they found that rape had not been committed, and in that event authorized conviction for the lesser offense; which instruction the jury followed and returned a verdict of assault with intent to rape.

Same: CORROBORATING EVIDENCE. The admissions of a defendant
2 charged with rape that he had had sexual intercourse with the prosecutrix were sufficient corroborating evidence.

New trial: MISCONDUCT IN ARGUMENT. Alleged misconduct of the
3 prosecuting attorney in argument in saying that defendant was guilty beyond all reasonable doubt, and that he ought to be convicted for the protection of other young girls in the county, was not reversible error; as it will be presumed that the jury would give the remarks of counsel no weight as evidence, and that they would understand one object of conviction to be the prevention of similar crimes.

Evidence: EXHIBITS. The stained clothing worn by prosecutrix at
4 the time of the offense was admissible in evidence, though its probative force was materially lessened by the time at which the blood stains were first observed.

Appeal from Jasper District Court.—Hon. K. E. WILCOCKSON, Judge.

TUESDAY, OCTOBER 15, 1912.

PROSECUTION for rape. Defendant was found guilty of an assault with intent to commit rape, and appeals.—*Affirmed.*

E. J. Salmon and E. M. S. McLaughlin, for appellant.

George Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

McCLAIN, C. J.—The defendant, under sixteen years of age, was found guilty of the crime of assault with intent to commit rape on the prosecuting witness, who, at the time of the alleged assault, was twelve years of age.

I. The contention for appellant is that the verdict is without support in the evidence, predicated upon the claim that under the record the defendant, if guilty in any degree, was guilty of rape, and, as the jury found him guilty only of an assault with intent to commit rape, there was such inconsistency between the evidence and the verdict as to require a reversal. The court instructed the jury that they might consider whether the defendant was guilty of an assault with intent to commit rape, if they found that rape had not been committed, fully instructing as to the included crime. As the evidence tended to show guilt of the crime with intent to commit rape, the verdict was not without support in the evidence, nor was it unauthorized by the instructions. The error, if any, committed in this respect was in so instructing the jury that there might be a conviction of an assault with intent to commit rape, although the evidence showed that, if any crime whatever was committed, it amounted to the crime of rape, as charged. It may be that if the court had failed to instruct with reference to an assault with intent to commit rape, and the defendant had been convicted of the crime of rape, we would have been justified in saying that there was no error for the reason the jury could not under the evidence have properly returned a verdict of an assault with intent to commit rape. But the converse is not necessarily true. We have never held that it constitutes prejudicial error to instruct with reference to an included crime, even though under the evidence a conviction for the crime charged, without

I. CRIMINAL LAW:
rape: included
offenses:
instruction.

an instruction as to the included crime, would have been sustained. It does not lie in the mouth of the defendant to complain that he has been convicted of a lower degree of crime than that which the evidence tends to establish. It is not to be presumed from the fact that the jury failed to convict of rape that they did convict of an assault with intent to commit rape without finding from the evidence beyond a reasonable doubt that the defendant was guilty of that crime. If the jury exercised undue leniency in their finding as to the degree of the crime committed, such error has resulted to defendant's benefit, and he can not complain. It is enough to say that, so far as the general sufficiency of the evidence is concerned, the verdict is not without ample support.

II. The corroboration required by the statute to connect the defendant with the commission of the crime which the prosecutrix testified was committed upon her was not wanting. Although the defendant denied his presence at the time and place where, as the prosecutrix testified, the crime was committed, and offered evidence tending to establish an alibi, counsel for defendant attempted by cross-examination of the prosecutrix and her mother to whom complaint was at once made, to establish that both of them had prior to the indictment spoken of the difficulty between the defendant and the prosecutrix as being in the nature of a fight rather than an attempt to commit rape, and a witness for the defense, at whose home the defendant lived, testified that the complaint at once made by the father of the prosecutrix to him with reference to the misconduct of the defendant related only to a fight. But it is not pretended that the evidence points to, or suggests, any other ground of complaint of misconduct on the part of the defendant toward the prosecutrix than that which was charged to have constituted the crime of rape.

A witness for the prosecutrix testified that he had a

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conversation with the defendant about the trouble between him and the prosecutrix in which the defendant admitted that he had sexual connection with the prosecutrix, although the time and place was not specified. It is true that this witness was somewhat confused in his testimony on cross-examination, but from his testimony as a whole the jury was justified in believing that such an admission was made by defendant, and that it related to the occasion described by the prosecutrix. The deputy sheriff also testified as a witness that, when he arrested the defendant under a warrant "with reference to the trouble with" the prosecutrix, defendant, on being told what the warrant was for, stated that "he would not have done it if she had not asked him to." Clearly these admissions by the defendant were sufficient to constitute the corroborating evidence required by statute.

III. There is complaint of misconduct on the part of the county attorney in saying to the jury that the defendant was guilty beyond a reasonable doubt, and that he should be convicted in order "to protect the young

3. NEW TRIAL:
misconduct in
argument.

girls in this county." There was no occasion for the county attorney to inform the jury as to his own conclusions with reference to the guilt of the defendant, but it certainly did not constitute a ground for a new trial if he did so, nor if he urged the jury to prevent the commission of similar offenses by the defendant or others by finding the defendant guilty. It must be presumed that the jury well understood that the conclusions of the county attorney were entitled to no weight whatever in their subsequent deliberations, and that the object of punishing the defendant, if they found him to be guilty of the crime charged, was to prevent, so far as practicable, the commission of similar crimes.

IV. The drawers worn by the prosecutrix at the time of the alleged commission of the crime were received in evidence over defendant's objection, showing blood spots. The circumstances testified to by the prosecutrix and her

mother as to the time when the blood spots were first observed were such as to materially weaken the weight of the evidence in this respect, but they were not such as to deprive it entirely of probative force. Without discussing the details of the evidence, it is sufficient to state our conclusion that the exhibit was properly received and the court properly instructed the jury with reference thereto.

Other complaints are made of the instructions, but they relate to objects which so far as they are not covered by the previous discussion appear from the record to be entirely without merit.—Judgment is *affirmed*.

RUTH SUTCLIFFE and FRED TOWNSEND, Appellants, v. J. D. PENCE, Appellee.

Appeal: DEFECTIVE ABSTRACT: AMENDMENT. An appeal will not be
1 dismissed because the original abstract was not subscribed by appellant's counsel, or because the same was not certified, where counsel's name appeared on the opening page of the abstract and both omissions were cured by an amendment.

Conveyances: CONSIDERATION: PAROL EVIDENCE. While a deed is the
2 culmination of the contract for the sale of land it rarely constitutes the full agreement; and although a grantor can not show a total want of consideration where one is expressed the nature and amount of the same may be inquired into. So that under a deed expressing a stated consideration, but excepting from the description the "railroad right of way," it was competent to show that in addition to the expressed consideration the grantor was to have whatever might be recovered for the right of way.

Money had and received: RECOVERY. Where a party by implied
3 if not express consent permits the use of his name in litigation for the benefit of another, he can not because of such use of his name hold the money recovered to his own use.

Same: EVIDENCE. In this action to recover money had and received
4 evidence that defendant had stated that he would not give plaintiff an order for the money but that she might get it if she could

was admissible, over the objection that it was a conclusion and hearsay.

Same: CONFIDENTIAL COMMUNICATIONS: REVIEW ON APPEAL. An objection to evidence because a confidential communication from client to attorney will not obtain, as against the uncontradicted testimony of the attorney that the relation did not exist; and if good the objection will not be considered on appeal unless first raised in the trial court.

Appeal from Monroe District Court.—HON. D. M. ANDERSON, Judge.

WEDNESDAY, OCTOBER 16, 1912.

ACTION at law to recover a sum of money alleged to have been received by the defendant for the use of the plaintiff, Ruth Sutcliffe. There was a directed verdict for the defendant, and plaintiffs appeal. The material facts are stated in the opinion.—*Reversed.*

Dashiell & Mason, for appellants.

Charles E. Miller and John R. Price, for appellee.

WEAVER, J.—The record without substantial conflict tends to show that in the year 1900 the plaintiff, Ruth Sutcliffe, was the owner of a tract of land which she sold and conveyed to the defendant. Prior to said sale, a railroad company had located and taken possession of a right of way across said land, and Mrs. Sutcliffe had an unsettled claim against said company for damages on account of such appropriation of her property, and such claim was then in litigation. In negotiating for the land, Pence did not wish to assume any responsibility for the lawsuit, and it was orally agreed between said parties that as a part consideration for the conveyance Mrs. Sutcliffe should receive from Pence a payment of \$1,800 and that, in addi-

tion thereto, she should receive whatever might be recovered in damages from the railroad company. The deed delivered in pursuance of said sale makes conveyance of the property describing it by the government survey "excepting railroad right of way." For a period of two years after the conveyance, the action against the railway company was prosecuted in the name of Mrs. Sutcliffe, when the question of her right so to do was raised by the company, and counsel advised suing the claim in the name of Pence for her benefit and dismissing the original action. This was done. Pence did not employ or undertake to pay counsel, nor was it then understood by any one that he had any real or substantial interest in the claim. Prior to the bringing of said action, counsel representing Mrs. Sutcliffe interviewed Pence, who disclaimed any interest in the litigation, and did not wish to be made liable for any costs so incurred. He was assured that he would be protected against any such liability, and that Mrs. Sutcliffe would take care of the question of costs. He did not forbid the use of his name, and thereupon the attorneys, with his knowledge and under the employment of Mrs. Sutcliffe, brought the suit, and prosecuted it to a successful conclusion. The amount of the judgment was paid into the hands of Fred Townsend, one of the attorneys prosecuting the action, and for his own protection he asked Pence to give him an order, directing its payment to Mrs. Sutcliffe. This Pence refused to do, saying, in substance, that he "never agreed to help her get the money," and that, if she would give him a share of it, he would consent to its being turned over to her. On another occasion, in response to her personal demand, he said: "No; I won't give you an order. It is yours, and, if you can get it, all right, but I will give you no order." To another witness he repeated in substance the same statement. Townsend as custodian of the money was made a party to the case, but has no interest in the controversy other than to settle the

question of the rightful ownership of the fund as between Pence and Mrs. Sutcliffe.

At the close of the testimony defendant moved for a directed verdict in his favor on the grounds: (1) The entire failure of plaintiff to show any right of recovery. (2) That the testimony offered by plaintiff is incompetent because it seeks by parol evidence to vary the terms of a written contract. (3) That the testimony is incompetent because it seeks to contradict the terms of the deed, and it is in contravention of the statute of frauds. This motion was sustained, and judgment entered against plaintiff for costs. It is from this ruling and judgment that the appeal has been taken.

I. Appellee has moved to dismiss this appeal because the original abstract of record was not subscribed by appellant's counsel. Their names did appear on the opening page of the abstract, and this was sufficient. *Alston v. Alston*, 114 Iowa, 29. The omission was also cured by an amendment. Objection is also made that the abstract is not certified. This was also corrected by an amendment. The motion is without merit, and is therefore denied.

II. In support of the judgment below appellee contends that plaintiff's claim for a recovery is based upon an alleged exception or reservation which she seek to ingraft upon the written deed by parol testimony in contravention of the statute of frauds, as well as in violation of the rule that a written contract can not be so altered or varied. The contention is not justified by the record. The claim she makes in no manner changes or modifies the effect of her deed to the defendant. If in the end she be found entitled to recover, defendant's right and title to the land described in the deed will not be diminished in the slightest degree. Nothing is reserved from the conveyance, and nothing is excepted from its operation save the right of way therein specifically men-

I. APPEAL:
defective
abstract:
amendment.

tioned. True, plaintiff by an apparent misapprehension of the exact meaning of the terms employed speaks of "reserving" her claim for damages, but, considering her testimony as well as that of others, it is perfectly clear that her claim, stated in terms of legal exactness, goes solely to the consideration she received or was to receive for the conveyance of her land. It is said that no such claim is pleaded, and that the amendment to the petition filed after the directed verdict was too late. Whether the amendment was in time we need not decide, for we do not think any amendment was required to entitle plaintiff to recover. The allegation is made in the original petition that plaintiff's right to prosecute this action for the recovery of this sum of money was "a part of the consideration" for the conveyance. The net effect of her claim, both before and after her amendment was filed, was that she sold and conveyed the land to defendant, and, in consideration thereof, was to receive from him the sum of \$1,800, and to have and receive whatever sum she might succeed in recovering from the railroad company. This being our interpretation of the issue between the parties, we need take no time to review the authorities which counsel for appellee have very industriously collected for our consideration upon the effect and validity or invalidity of parol reservations from deeds of conveyance.

We have then upon this branch of the case to consider whether the deed is a written contract which excludes plaintiff from showing by parol proof the agreement by which she was to receive the proceeds of the claim against the railroad company. This objection can not be sustained. While the deed is the culmination of the contract for the sale of the land, it very rarely, as we all know, contains or constitutes the contract itself. *Puttman v. Haltey*, 24 Iowa, 425; *Trayer v. Reeder*, 45 Iowa, 272; *Greedy v. McGee*, 55 Iowa, 759. Ordinarily the grantor will not be permitted to show that

2. CONVEYANCES:
consideration:
parol
evidence.

there was no consideration if the deed expresses one, but upon any proper issue it is competent for either party to prove the real nature and amount of such consideration although it differs to some extent from that expressed. *Maxwell v. McCall*, 145 Iowa, 687; *Gardner v. Lightfoot*, 71 Iowa, 577; *Doolittle v. Murray*, 134 Iowa, 547; *Lewis v. Day*, 53 Iowa, 575; *Dicken v. Morgan*, 54 Iowa, 684. It is therefore competent for plaintiff to prove that, while the deed expressed a consideration of \$1,800 (which was in fact all that defendant undertook to become personally responsible for), it was still further agreed that she should be entitled to receive payment of whatever sum should thereafter be derived from the claim against the railway company. The plaintiff did show without dispute, as we have already noted, that the oral agreement by which she was to receive this money if collected was a part of the consideration upon which she parted with the property.

The use of defendant's name in the litigation for her benefit was with his implied if not his express consent, and his belated claim to hold the money for his own use has as little foundation in law as in morals.

3. MONEY HAD
AND
RECEIVED:
RECOVERY.

A witness for plaintiff having testified that in conversation with defendant the latter said he would not give Mrs. Sutcliffe an order for the money but that she might get it if she could, the court struck out the testimony as being only conclusion and hearsay. The testimony had but slight bearing on the controversy, though we think it admissible. Certainly it was not open to the objection made to it. Other rulings upon testimony are covered by what we have already said in discussing the grounds upon which the verdict was directed.

4. SAME:
evidence.

Counsel for appellee have favored us with a discussion of the law of easements as affected by conveyances of land, but, for reasons already stated, we think the subject is in no manner involved in the issues presented for trial.

We are also reminded of the statute which prohibits an attorney at law from disclosing communications received from a client. This point we assume is directed to the testimony of the attorneys who conducted the litigation, and obtained the judgment against the railroad company. No objection of that kind was raised upon the trial below.

5. SAME:
confidential
communica-
tions: review
on appeal.

But, even if made, it would have been without merit. The witnesses both declared that defendant was not their client, that he never employed or consulted them in the case, and that his relation thereto was nominal only. This statement is not denied in testimony, and we must accept it as true.

It is unnecessary to prolong this opinion. For reasons we have already explained, the plaintiff upon the record made was clearly entitled to recover the fund in controversy, and the court erred in giving it to the defendant. The judgment appealed from is reversed, and cause remanded for further proceedings in harmony with this opinion.—*Reversed.*

LINGENFELTER BROTHERS and OTHERS, Appellants v.
GEORGE W. BOWMAN and SARAH A. BOWMAN, and
GEORGE W. BOWMAN and SARAH A. BOWMAN v. LIN-
GENFELTER BROTHERS and OTHERS, Appellants.

Suretyship: HUSBAND AND WIFE. By joining with her husband in a mortgage of the homestead as additional security for notes of the husband signed by the wife simply as surety, and from which she derived no benefit, she stands merely in the position of surety and is entitled to protection as such.

Same: FRAUD OF PRINCIPAL. One dealing with a surety must exercise the utmost good faith at every step of the transaction; he can do nothing to deceive or mislead the surety without vitiating the agreement. In this case the creditor induced the wife to mortgage their homestead as additional security for the husband's debt by false representations knowingly made, that the property already mortgaged to secure the debt was ample secur-

ity, and that the homestead would not be called upon to bear any part of the burden. *Held*, that the transaction was void for fraud.

Attorney and client: AUTHORITY OF ATTORNEY: RATIFICATION. An
3 attorney has statutory authority to bind his client in respect to any proceeding within the scope of his proper duties and powers; but this does not authorize him, under a mere general employment to bring and prosecute an action, to enter into a stipulation of settlement of all matters involved in the suit and to dismiss the same, thus depriving his client of a just cause of action; this can only be done by special authority. And there could be no ratification of the attorney's act by the client without a knowledge of the terms and effect of the stipulation.

Mortgages: SATISFACTION AND DISCHARGE. Where a mortgage was
4 given as additional security to a bank from which the mortgagee had borrowed money for the benefit of the mortgagor, and not as additional security to the mortgagee, it was of no validity in the hands of the mortgagee after he had paid the debt to the bank and the notes held by it were returned to him.

Appeal from Clarke District Court.—HON. THOMAS L. MAXWELL, Judge.

WEDNESDAY, OCTOBER 16, 1912.

THE facts are stated in the opinion.—*Affirmed.*

H. R. Vasey, and Blake & Blake, for appellants.

O. M. Slaymaker, and V. R. McGinnis, for appellees.

SHERWIN, J.—George W. Bowman and Sarah A. Bowman are husband and wife, who were living at the time of the transaction involved herein in Clarke county. George W. Bowman became interested in a stock of goods in Indianola, upon which he gave a chattel mortgage for \$5,700 to one Cottingham. He afterwards traded this stock of goods to Lingenfelter Bros., of Collins, Iowa, for a business property located there, which will be hereinafter

designated as the "Collins property." It was the agreement that the stock of merchandise should be delivered to Lingenfelter Bros., free of incumbrance, and, to effect such agreement the Lingenfelter Bros., borrowed \$5,700 of the Capital City State Bank of Des Moines, giving their note therefor, and the money so borrowed was used to pay off the Cottingham claim against the stock of goods. George W. Bowman then gave Lingenfelter Bros. his notes and a mortgage on the Collins property that he had received for the stock of merchandise for \$6,400; this amount including the \$5,700 paid by Lingenfelter Bros. to Cottingham, and, in addition thereto, \$700 on account of sales that had been made from the stock while Bowman was in possession thereof. Sarah A. Bowman signed those notes as surety for her husband at the request of the Lingenfelters. Some time after these notes were given and before their maturity, Bowman was informed that they were held by the Capital City State Bank of Des Moines, and in January, 1906, one of the Lingenfelters called on the Bowmans at their home in Osceola, and represented to them that the bank wanted more security for the notes, and asked that the Bowmans give a mortgage on their homestead as such additional security. The Bowmans finally executed and delivered to Lingenfelter such a mortgage, upon the representations and under the conditions we shall hereinafter more fully notice. After this Bowman conveyed the Collins property to one Fowler, who took it subject to the mortgage thereon to the Lingenfelters, and still later the Bowmans, fearing that they would lose their homestead, began an action in equity in Clarke county for the cancellation of the mortgage thereon. This suit was dismissed without trial upon a stipulation, which will receive further attention as we proceed. Thereafter the Lingenfelter Bros. and the Capital City State Bank, as plaintiffs, foreclosed the mortgage on the Collins property, taking a judgment on the notes for the amount due thereon. In due time this

property was sold under foreclosure and was bid in by the Lingenfelter Bros. for \$4,000. No redemption from said sale was made by Fowler, and Lingenfelter Bros. acquired title thereto by sheriff's deed, and now have the property. After this foreclosure and sale thereunder, the Lingenfelters began an action in Clarke county for the foreclosure of the mortgage on the Bowman homestead. This action was defended on the ground that the mortgage thereon was procured by fraud, and about the same time the Bowmans brought an action in equity for the cancellation of the stipulation of settlement in the case of the Bowmans against the Lingenfelters and the Capital City State Bank, to which we have heretofore referred, on the ground that it was procured by fraud and misrepresentation. These two later cases were consolidated and tried as one, and there was a decree adjudging that the mortgage on the homestead of the Bowmans was procured by fraud and cancelling the same, and further adjudging that the stipulation of settlement in the case of the Bowmans against the Lingenfelters and the Capital City State Bank be canceled. The Lingenfelters appeal. The Capital City State Bank had been eliminated from the litigation by voluntary dismissal before judgment. Sarah A. Bowman was not a party to any of the transactions culminating in the execution of the notes to the Lingenfelter Bros., and she was a surety only on said notes.

When she executed the mortgage on the homestead in Osceola, she simply pledged her interest therein as additional security to the bank for the notes that her husband had given to Lingenfelter Bros. and which they had deposited with the bank as collateral security for their loan. Mrs. Bowman was therefore a surety merely, and she is entitled to the protection of a surety, because she derived no advantage from any of the transactions.

1. SURETYSHIP:
husband
and wife.

Where a creditor is about to accept security from a

surety, it is his legal duty to "inform the surety of facts within his knowledge which would have the effect to increase the risks of the undertaking of the surety. . . . The law imposes on the creditor the duty of dealing with the surety at every step of the transaction with the utmost good faith. If the surety applies to him, before entering into the contract, for information touching any matter materially affecting the risk of the undertaking, he is bound, if he assumes to answer the inquiry at all, to give full information as to every fact within his knowledge; and he can do nothing to deceive or mislead the surety without vitiating the agreement." *Bank of Monroe v. Anderson Bros. et al.*, 65 Iowa, 692; *Barnes v. Savings Bank*, 149 Iowa, 367. Here it is clearly shown that Mrs. Bowman at first refused to execute the mortgage on the homestead, and that she was only induced to do so finally by the representations of Lingenfelter that the Collins property was worth much more than the debt sought to be further secured, and by his promise that they would see to it that the Collins property brought the amount of the debt and more, and that the homestead would not be called upon to bear any part of the burden. The representations as to the value of this property were false and known to be so at the time they were made. They had occupied this property for years and were then occupying it and knew its value, and this value they fixed at \$4,000 when they purchased it at foreclosure sale, although they had represented to Mrs. Bowman that it was worth from \$8,000 to \$12,000. It will not do to say that such representations were the expressions of opinion only, and not binding on the Lingenfelters. The question of the value of the Collins property was very material to Mrs. Bowman, and, without these assurances of its value for the purpose of paying the debt for which it was security, she would not have pledged her homestead right for the purpose of satisfying the bank. She had a right to rely upon the repre-

a. SAME:
fraud of
principal.

sentations, and it was the duty of the Lingenfelters, under the circumstances, to tell her the truth about the value of the property. We think the court rightly found that the mortgage in question was obtained by fraud and false representations.

The stipulation in the former suit, to which we have heretofore referred, provided that the Capital City State Bank should foreclose the mortgage on the Collins property and exhaust said property before claiming anything from the homestead property in Osceola, and that it would "only look to the

3. ATTORNEY AND
CLIENT:
authority of
attorney:
ratification.

Osceola property for any deficiency arising from the foreclosure or sale of said Collins property." And, after other agreements not of moment here, the stipulation concluded as follows: "This stipulation is a settlement of all matters involved in the petition and the several counts and amendments thereto; and said petition is dismissed in accordance with this stipulation, at the costs of plaintiff." The suit in which this stipulation was filed was the one brought by the Bowmans to set aside and cancel the mortgage on the Osceola homestead property on the ground that it was obtained by fraud. The attorney, who represented the Bowmans at that time, testified in this case that he was induced to enter into such stipulation by the representations of the Lingenfelters that the Collins property was ample to pay the mortgage given thereon by Bowman, and in the belief that no claim would ever be made against the homestead property for a deficiency. It is further conclusively shown that the stipulation was hurriedly prepared and signed by him for the Bowmans, and that it was so signed without consultation with either of them and without specific authority to make the same.

While section 319, subd. 2, of the Code, gives an attorney power "to bind his client to any agreement, in respect to any proceeding within the scope of his proper duties and powers," we are of the opinion that this stipula-

tion went so far beyond the proper duty and power of the attorney in the case then pending as to render it without authority. If the stipulation is to be given the broad effect claimed for it by the appellants, it entirely deprived the Bowmans of a just cause of action against the Lingenfelters at least, and, if that be true, the attorney had no authority to enter into it by virtue of his general employment to bring and prosecute the suit, and it is conclusively shown that he had no special authority in the matter. The transaction falls squarely within the rule announced in the following cases: *Ohlquest v. Farwell*, 71 Iowa, 233; *Rhutasel v. Rule*, 97 Iowa, 20; *Bigler v. Toy*, 68 Iowa, 687; *Drain v. Dogget*, 41 Iowa, 682; *Kilmer v. Gallaher*, 112 Iowa, 583. Appellants say, however, that, even if the stipulation was made without authority, it was afterwards ratified by the Bowmans, and hence is still effective. But the Bowmans never had any such knowledge of the terms and effect of the language used in the stipulation as would amount to a ratification.

Another reason why the appellants should not prevail in either of these consolidated actions is because the mortgage on the homestead was given for the additional security of the Capital City State Bank, and not as additional to the appellants. Appellants procured the mortgage on that express representation, and when the appellants paid their indebtedness to the bank and the Bowman notes were returned to the appellants, as they were before this foreclosure was begun, the mortgage on the homestead had performed its full function, and was thereafter of no effect so far as appellants were concerned. Appellants obtained a stock of merchandise free and clear of incumbrance, worth \$9,000, and the Collins property, which they represented as worth at least \$8,000, and which they now have for \$5,700, the amount they borrowed of the bank to pay off the Cottingham mortgage. The appellees have nothing left but their home-

4. MORTGAGES:
satisfaction
and
discharge.

stead, and we think the trial court correctly held that the equities were with the appellees. Its judgment is therefore affirmed.

Appellees made the point that the record had not been so preserved as to enable us to dispose of the case on the merits, but we have preferred to do so in view of the dispute over the certification.—*Affirmed.*

HARRY WILSON v. S. M. THURLOW and W. A. EDDY,
Appellants.

Malicious prosecution: PROBABLE CAUSE: EVIDENCE. Before commencing a criminal prosecution the complainant must use ordinarily reasonable and prudent means to ascertain the facts upon which the prosecution is based; and the question of probable cause is for the jury except where the evidence is such that all reasonable minds must reach the same conclusion therefrom.

Same: ADVICE OF COUNSEL AS A DEFENSE. The advice of an attorney to constitute a defense to an action for malicious prosecution must be based upon a full and fair statement of all the facts within the defendant's knowledge, and the advice must have been acted upon in good faith and with a belief that there was good cause for the prosecution; and these are generally questions for the jury.

Same: CONSPIRACY. Evidence that several persons were jointly instrumental in filing a criminal information thus causing a prosecution, and of their participation therein, will justify a finding of a conspiracy to prosecute the plaintiff.

Same: MALICE. Malice may be inferred from want of probable cause; and such inference alone will support a finding of malice.

Same: PROBABLE CAUSE: MALICE: INSTRUCTIONS. Where the court instructed that plaintiff must show that he was prosecuted substantially as alleged in the petition, that the prosecution was malicious and without probable cause and he must so prove, an instruction that defendants admitted that plaintiff was prosecuted substantially as alleged, was not objectionable as leading the jury to think that probable cause and malice were admitted.

Same: CONSPIRACY: EVIDENCE. Evidence that defendants agreed that

6 one of them should file an information causing the arrest of plaintiff, and that they should jointly assist in the prosecution, justified a finding that they both instigated or procured the prosecution, and rendered both liable for malicious prosecution.

Same: DAMAGES: INSTRUCTION. Where the plaintiff asked as part 7 of his damages a certain sum for attorney's fees, and the evidence showed that he had paid or agreed to pay a less sum, and there was no showing that the jury allowed more on this item than the evidence warranted, the instruction that they might allow such attorney's fees as were proven, not in excess of the amount claimed, was proper.

Appeal from Clarke District Court.—HON. THOMAS L. MAXWELL, Judge.

THURSDAY, OCTOBER 17, 1913.

ACTION to recover damages for a malicious prosecution and conspiracy. Trial to a jury, and verdict and judgment for the plaintiff. The defendants appeal.—*Affirmed.*

Jas. H. Jamison, Touet & Hedrick, and Lloyd Thurston, for appellants.

V. R. McGinnis, and O. M. Slaymaker, for appellee.

SHERWIN, J.—The plaintiff is a young colored man, who is married and a resident of Clarke county. The defendant Eddy filed an information before a justice of the peace charging the plaintiff with an indecent exposure of his person. The plaintiff waived an examination before the justice, and gave a bond to await the action of the grand jury of the county. The charge was duly presented to the grand jury, but no indictment was returned, and the plaintiff was therefore discharged. This suit was afterwards brought by him to recover damages against both Eddy, who signed and filed the information, and Thurlow, who, it is alleged, conspired with Eddy to prosecute the

plaintiff and to injure and wrong him. There was absolutely no truth in the charge made against this plaintiff.

I. The appellants claim that there was no evidence before the jury to show want of probable cause, and because thereof that the court should have sustained their motion

1. MALICIOUS PROSECUTION: probable cause: evidence. for a directed verdict. Information had come to Eddy and Thurlow that some colored man

had shortly before made an indecent exposure of his person to some little school girls while the man was passing along the highway. This plaintiff had been drawing corn over that road, and practically on the strength of such fact he was charged with the crime, and this without any material investigation to determine whether he was the man who had made such exposure. Before commencing a criminal prosecution, the accusing person must use the means which an ordinarily reasonable and prudent man would exercise to learn the facts (*Flackler v. Novak*, 94 Iowa, 634; *Walker v. Camp*, 63 Iowa, 630, and, except where the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion therefrom, the question whether there was or was not probable cause must be determined by the jury (*Krehbiel v. Hinkle*, 142 Iowa, 677). There was evidence in this case from which the jury might have concluded that the defendants did not exercise the degree of care required by the law, and that the charge was recklessly made.

II. It is further contended by appellants that the judgment should not be allowed to stand, because the record shows that they laid all of the facts before the county

2. SAME: advice of counsel as a defense. attorney before filing information, and then acted on his advice. Whether defendant in

good faith acted on the advice of the county attorney is generally a question for the jury. *White v. Textbook Co.*, 144 Iowa, 92. Advice of an attorney to constitute a good defense must be based on a full and fair statement of the facts within defendant's knowledge, and

the advice must have been acted on in good faith and with the belief that there was good cause for the prosecution, and whether or not these things were done is a jury question. *While v. Textbook Co.*, *supra*; *Center v. Spring*, 2 Iowa, 393; *Acton v. Coffman*, 74 Iowa, 17.

III. There was evidence justifying the finding that there was a conspiracy between the defendants to prosecute the plaintiff. They acted in concert; both being instrumental in filing the information and causing the prosecution. All persons participating in such prosecution are liable. *Green v. Cochran*, 43 Iowa, 544.

IV. There was sufficient evidence of malice to take the question to the jury. Malice may be inferred from want of probable cause, and such inference alone may be sufficient to sustain a finding of malice. *Pierce v. Doolittle*, 130 Iowa, 338; *Connelly v. White*, 122 Iowa, 391; *White v. Textbook Co.*, *supra*.

V. Complaint is made of instruction 3, wherein the court told the jury that the defendants admitted that plaintiff was, in fact, prosecuted substantially as alleged in his petition. But the jury could not possibly have been led by such instruction to think that defendants admitted want of probable cause and malice, which, of course, the petition alleged. The court, in the first paragraph of the instructions told the jury that certain requisites were necessary to entitle plaintiff to recover, (1) that he was prosecuted in a criminal action substantially as alleged, (4) that the prosecution was without probable cause, and (5) that said prosecution was malicious. Instruction 3 was made specifically applicable to the first requisite named in the first instruction, and in instructions following No. 3 the court instructed that the plaintiff must prove want of probable cause and malice.

VI. Instruction 4 given by the court will not bear the

interpretation given it by defendants. It did not tell the jury that, if Thurlow had knowledge that Eddy was going to file an information against the plaintiff, such fact would be sufficient to constitute conspiracy. What the court did say was that if it was agreed and understood between Eddy and Thurlow that Eddy should file the information and cause the arrest of the plaintiff, and that they would both jointly encourage and assist in the prosecution of the charge, the jury would be justified in finding that Thurlow with Eddy instigated or procured the prosecution. The instruction is in our judgment beyond criticism.

6. SAME:
conspiracy:
evidence.

VI. The petition asked for the recovery of attorney's fees in the sum of \$25 as a part of the damages. The evidence showed that the plaintiff had either paid or agreed to pay \$15⁰ for his defense to the charge made against him, and the court instructed that the jury might allow him such attorney's fees as were proven, not to exceed the amount claimed in the petition. There is nothing to show that the jury allowed more for attorney's fees than the evidence warranted, and the complaint of the instruction is without merit. Two juries have found this plaintiff entitled to recover on this cause of action, and we now find no just reason for sending the case back for another trial. The judgment is therefore —*Affirmed.*

7. SAME:
damages:
instruction.

MARY E. WILSON, Appellant, v. JOHN McCARTY, Appellee.

Misconduct: ARGUMENT: REVIEW ON APPEAL. The unverified statement, in a motion for new trial, of alleged improper argument of counsel is not a sufficient showing of misconduct to authorize its review on appeal.

Trial: VERDICT: SUFFICIENCY. A verdict is sufficient to authorize a judgment if it clearly expresses the intention of the jury. The verdict for defendant in this action for breach of marriage prom-

ise which had appended to the form as prepared by the court the words "not guilty" was not thus rendered insufficient; especially as plaintiff did not ask to have the jury reform or correct it in any manner, but simply raised the question of its sufficiency in a motion for new trial.

Appeal from Davis District Court.—HON. FRANK W. EICHELBERGER, Judge.

THURSDAY, OCTOBER 17, 1912.

ACTION for breach of promise of marriage. Trial to a jury. Verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

T. P. Bence, for appellant.

Payne & Goodson, and *F. Thompson*, for appellee.

DEEMER, J.—Plaintiff is a widow, who at the time it is claimed the promise of marriage was made was sixty-two years of age. She lived at the town of Drakeville, and owned the cottage in which she lived, and some other property. Defendant, who was at the time in question seventy-seven years old, was a widower, and he, too, lived in Drakeville. Plaintiff claims that defendant called upon and courted her for more than two years, and that some time prior to July 1st he promised to marry her; that since that time he has denied the promise, and refused to marry her. Defendant denied the alleged promise, and also pleaded that plaintiff was diseased, and in such a mental and physical state that marriage was impossible. This was pleaded not only in justification of his refusal, but also in mitigation of damages. He further pleaded that plaintiff was mentally incompetent to enter into a contract of marriage; that her mind is and was unbalanced, and that her case was under investigation by the commissioners of

insanity; and that she was therefore incapable of entering into the marriage relation. He also pleaded that plaintiff falsely accused him with having sexual intercourse with her, and falsely claimed that, as a result thereof, she was made pregnant, and that she maliciously circulated such reports against him.

After this answer was filed, plaintiff, in an amendment to her petition, alleged, "that after said promise of marriage alleged in petition the defendant, in further abuse of this plaintiff, and to her great grief, humiliation, mortification, and mental anguish, after trying all seductive arts in his power to induce the plaintiff to have sexual intercourse with him, and in failing therein so to do, he accomplished said purpose with her by force and against her will, to her great humiliation, shame, grief, mortification, and mental anguish, and, to prevent her from taking action thereon, attempted to pacify her and quiet her by holding out to her that they were morally man and wife, and that said acts would be covered and excused by their subsequent marriage, and thus induced her for a reasonable time to keep quiet on said subject and trust in him and rely on what she supposed to be his honor; and the said seductive and sexual intercourse was brought about and accomplished by said defendant by force, under and by virtue of said contract of marriage. The plaintiff, relying upon said contract of marriage as set forth in petition, yielded up her virtue to said defendant, and was on account thereof seduced by him, which matters are hereby pleaded in aggravation of damages."

This was denied by defendant, and the defenses already mentioned were repleaded with some additions. Many other pleadings were filed, which need not be noticed at this time. On these racy issues the case was tried, and the jury found for defendant. Little, if any, of the testimony is in the record; but we may assume from the instructions that it followed the issues made by the pleadings.

There are but two propositions relied upon for a reversal, and these are misconduct of defendant's counsel in argument to the jury and insufficiency of the verdict returned.

I. As to the first proposition, there is no such showing of misconduct that we may consider the point. The only record relied upon is an unverified statement, made

I. MISCONDUCT:
argument:
review on
appeal.

in the motion for a new trial, as to what counsel said. The trial court made no finding as to what was said, and the remarks

were evidently not taken down by the shorthand reporter. If any finding was made by the trial court, it may well be inferred that it was to the effect that no such statements were made; for the motion for new trial was overruled. *Everett v. Railroad Co.*, 73 Iowa, 442. Even if the remarks attributed to counsel were made, they are not sufficient to justify a reversal. What was said was in explanation of defendant's absence from the courtroom at the time the argument was being made, and they were in no manner prejudicial.

II. The court submitted two forms of verdict to the jury. One reading: "We, the jury in the above-entitled case, find for the defendant. ———, Foreman." When

a. TRIAL:
verdict:
sufficiency.

the jury returned with its verdict, it was in this form: "We, the jury in the above-entitled case, find for the defendant,

not guilty. Wm. Plank, Foreman." The words "not guilty" were written in ink by some member of the jury upon the form submitted by the court. Plaintiff excepted to the verdict when returned, but did not ask the court to have the jury reform it, or for its correction in any way, but in her motion for a new trial claimed that it was insufficient to justify a judgment for the defendant. The same point is made here for a reversal. The proposition that the verdict is insufficient is without merit. It was a clear finding for the defendant, and would indicate that some of the jurors had knowledge of the old form of

verdict in such cases, which was "not guilty." How the words came to be appended is not shown; but that they do not change the effect of the verdict submitted to the jury is quite clear. Under the Code, a verdict is sufficient if it expresses the intention of the jury. Code, section 3731. And section 3732 authorizes the court to put the verdict in form. In doing this the court might very well treat the words "not guilty" as surplusage, and this is exactly what was done. The Kentucky court used these words in considering a like question: "While the letters of the immortal Junius shall continue to be read, or whilst the trial by jury continues to be something more than a mere name, we hope the case of *Rex v. Woodfall* will never be acknowledged as a fit example for American courts. . . . Though the verdict may not conclude formally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve. Verdicts are not to be taken strictly like pleadings; but the court will collect the meaning of the jury, if they give such a verdict that the court can understand them." *Worford v. Isbel*, 1 Bibb (Ky.) 247 (4 Am. Dec. 633). See, also, *Wright v. Clark*, 50 Vt. 130 (28 Am. Rep. 496); *Gillespie v. Ashford*, 125 Iowa, 729.

There is no merit in either of the contentions made for appellant, and the judgment must be, and it is—*Affirmed*.

P. L. SEVER, Appellee, v. MINNEAPOLIS & ST. LOUIS RY.
Co., Appellant.

Railroads: INJURY TO PASSENGER: NEGLIGENCE: SUFFICIENCY OF EVIDENCE. A passenger suing for personal injury because of alleged negligence in the operation of the train is not required to produce direct evidence of negligence of the employees. If he shows an unusual and violent jerk or jar of the car, such as would

not ordinarily happen under an exercise of due care, that is sufficient to make a *prima facie* case.

Same: EXPERT EVIDENCE: ULTIMATE CONCLUSION. An expert witness 2 may state his knowledge concerning the treatment and care of a personal injury, or basing his answers upon an assumed state of facts, may then testify that the injury in his opinion may or may not have resulted from the facts stated; but it is not permissible for him to state as an ultimate fact that the injury was thus caused; as it is the province of the jury alone to draw the ultimate conclusion. The evidence in this case was objectionable for the reason stated.

Appeal from Dallas District Court.—HON. LORIN N. HAYS, Judge.

FRIDAY, OCTOBER 18, 1912.

ACTION at law to recover damages for injuries received by plaintiff while a passenger on one of defendant's trains. Trial to a jury. Verdict and judgment for plaintiff in the sum of \$3,000, and defendant appeals.—*Reversed and remanded.*

Geo. W. Seevers, and W. H. Bremner, and White & Clarke, for appellant.

Burton Russell, and Geo. B. Lynch, for appellee.

DEEMER, J.—While a passenger on one of defendant's trains in the state of South Dakota plaintiff claims to have been injured through the negligence of defendant's servants and agents in handling a mixed train made up of freight and passenger coaches. It is claimed that these employees switched the train upon which plaintiff was riding onto a side track against a freight car or cars standing upon the siding with such force and violence as to violently shock him and injure and wrench the muscles and tendons of his back, thus severely and permanently injuring him. The

defendant denied the alleged negligence, and also denied that plaintiff suffered any injury from the alleged collision. On these issues the case was tried upon conflicting testimony, and the verdict was for plaintiff in the amount already stated. Three main propositions are relied upon for a reversal.

The first challenges the sufficiency of the testimony to establish negligence. Aside from the fact that there was a collision of some kind the nature of which is in dispute, there is positive testimony in the record from plaintiff himself of such a shock or jar from the impact of the cars as would take the case to a jury. Plaintiff was not required to produce direct testimony as to the negligence of the employees. As a rule a passenger can not do this. He knows only of results, and, if he shows an unusual and violent jerk or jar, such a one as would not ordinarily happen had the employees used due care, he has made out at least a *prima facie* case. *Burr v. Railroad Co.*, 64 N. J. Law, 30 (44 Atl. 845); *Dougherty v. Railroad Co.*, 81 Mo. 325 (51 Am. Rep. 239); *Consolidated Co. v. Thalheimer*, 59 N. J. Law, 474 (37 Atl. 132); *Railroad Co. v. Pollard*, 22 Wall. 341 (22 L. Ed. 877); *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Pershing v. Railroad Co.*, 71 Iowa, 561; *Inland Co. v. Tolson*, 139 U. S. 551 (11 Sup. Ct. 653, 35 L. Ed. 270); *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672 (74 N. W. 1074, 69 Am. St. Rep. 736); *Clow v. Traction Co.*, 158 Pa. 410 (27 Atl. 1004). While there is some little confusion in the cases upon this proposition, we think the maxim *res ipsa loquitur* applies, and that there was enough testimony to take the case to a jury. This holding answers two contentions made for appellant, and there remains but one to which we need give attention. That has reference to rulings on certain testimony introduced by plaintiff.

II. Three or more doctors were examined for plaintiff, and hypothetical questions were propounded to each

I. RAILROADS:
injury to
passenger:
negligence:
sufficiency of
evidence.

of them in substantially the same form. These questions were very long, and covered substantially all the testimony given with reference to plaintiff's position in the car, the nature of the jar to the train in which he was riding, the character of the injuries claimed by him, the nature and extent thereof, and the descriptions given thereof by his attending physicians, and the questions wound up with these interrogatories:

2. SAME:
expert
evidence:
ultimate
conclusion.

What would you say as a physician and surgeon as to the probability of his injury, the probable cause of the injury that you have detailed before the jury? What do you say was the probable cause of the injury? . . . Q. Now, Doctor, taking these facts into consideration, under these and no others, what would you say was the cause of the detachment or rupture of the muscles? . . . Taking these facts into consideration and no others, what would you say was the probable cause of the injury? . . . What do you say was the fact with these facts and others, what would you say was the probable cause of the injury? . . . Q. Now, Doctor, taking the same question which I gave you, taking these same facts into consideration and no others, what will you say was the cause of the condition that you have detailed here to the jury? (The answers to these interrogatories were as follows:) A. Well, it seems to me I have answered the question before that covers the question from the history given by the above. I would say that the circumstances on the railroad train caused the injury. . . . A. I should say unquestionably it was due to the impact of the train causing enforced flexion of the spine. . . . A. Due to the impact of the cars.

In addition to objecting to the questions when propounded as incompetent calling for conclusions and invading the province of the jury, defendant's counsel moved to strike each and all of these answers. The objections and motions were overruled, and these rulings present the only serious question in the case. Unless we are to make a radical departure from the rule announced in many of our

previous cases, we must hold that these rulings were erroneous. In *Muldowney v. Railroad Co.*, 39 Iowa, 622, we said: "This question and answer put the witness in the place of the jury to determine the ultimate fact, and it was, therefore, error to admit them. The witness might properly state what facts he knew respecting the treatment and care, and then give his medical opinion upon such facts, or he might be asked his opinion upon an assumed state of facts which the testimony of the other witnesses tended to establish." See, also, *Phillips v. Starr*, 26 Iowa, 351; *Martin v. Light Co.*, 131 Iowa, 739; *Butler v. Insurance Co.*, 45 Iowa, 98; *In re Betts' Estate*, 113 Iowa, 116; *Collins v. Railroad Co.*, 122 Iowa, 231; *Brueggeman v. Railway Co.*, 147 Iowa, 191; *State v. Rainsbarger*, 74 Iowa, 196. See also, the following from other states: *Ill. Cent. R. R. v. Smith*, 208 Ill. 608 (70 N. E. 628); *Hellyer v. People*, 186 Ill. 550 (58 N. E. 245); *People v. Hare*, 57 Mich. 505 (24 N. W. 843); *Lacas v. Railroad Co.*, 92 Mich. 412 (52 N. W. 745); *Rowell v. Lowell*, 11 Gray (Mass.) 420; *Filer v. Railroad Co.*, 49 N. Y. 42; *Tyler v. Wheeler* (Tex. Civ. App.) 41 S. W. 517. These cases and many others which might be cited draw a sharp distinction between a question calling for an opinion by an expert as to what might or might not have caused an injury and one calling for an opinion as to what in fact did cause it. We need only to make the following additional quotations: In *State v. Rainsbarger*, *supra*, we said: "The counsel for defendant, after stating hypothetically the condition of the body of the deceased, the character of the wounds, and other matters, asked a witness who was a physician how the wounds upon defendant were probably made. The evidence was rightly excluded. It sought for an expression of opinion based upon matters which were to be weighed and considered by the jury, and determined by the exercise of their own judgments, and not upon the opinion of another. The matters upon which the question was based were not

peculiarly within the knowledge of the witness or of the profession to which he belonged." In *Re Betts' Estate*, *supra*, this language was used: "The answer of the witness to the fifth interrogatory was rightly suppressed, for the reason that a witness can not be permitted to give his opinion in answer to any inquiry which embraces the whole merits of the case and leaves nothing for the jury to decide;" Citing *De Witt v. Barly*, 17 N. Y. 347; *Jamerson v. Drinkald*, 12 Moore, 148; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329. See, also, *Muldowney v. Railroad Co.*, 39 Iowa, 615-622, and Rogers, *Expert Evidence*, pages 37, 47. In *Martin v. Light Co.*, *supra*, we gave expression to the rule in these words: "It is an accepted rule that, while experts may testify as to what in their opinion may or may not have been the cause of a given result or condition, it is not permissible for them to give their opinion as to the ultimate fact which the jury is organized to determine. See *Sachra v. Town of Manilla*, 120 Iowa, 567, and cases there cited. It is the promise of the jury alone to draw ultimate conclusions. *Largan v. Railroad*, 40 Cal. 272; *Perry v. Graham*, 18 Ala. 822; *Railroad v. Atteberry*, 43 Ill. App. 80; *Butler v. Railroad Co.*, 87 Iowa, 206; *Muldowney v. Railroad Co.*, 39 Iowa, 615; *Marcy v. Insurance Co.*, 11 La. Ann. 748; *Wilson v. Reedy*, 33 Minn. 503 (24 N. W. 191); *Briggs v. Railroad Co.*, 52 Minn. 36 (53 N. W. 1019); *Davis v. Fuller*, 12 Vt. 178 (36 Am. Dec. 334). It is not always easy to draw the line between that which is and that which is not admissible under this rule; but in our judgment the question now under consideration required the witness to enter the domain of the jury and pass upon one of the ultimate propositions inhering in the verdict, and the answer should have been excluded." In *Sachra v. Town of Manilla*, 120 Iowa, 567, we said: "What, in fact, causes a wound or injury, is a question for the jury, but what might or might not have caused it is a matter of expert testimony. Rogers on

Expert Evidence (2d Ed.) page 128. This is the point of distinction which appellant's counsel has overlooked. The ruling is sustained by *State v. Seymour*, 94 Iowa, 705; *State v. Porter*, 34 Iowa, 131; *State v. Morphy*, 33 Iowa, 270; *Armstrong v. Ackley*, 71 Iowa, 76." In *Bruggeman v. Railway Co.*, 147 Iowa, 196, we said: "As these questions called for the very matters which the jury was to determine, rather than answers to hypothetical questions, or as to the time in which such a train might have been stopped, the court was in error in overruling the objection. This is squarely held in *Nosler v. Railroad*, 73 Iowa, 268. See, also, as sustaining the same proposition, 8 Ency. of Pleading & Practice, 751, and cases cited, including the following from Iowa: *Whitsett v. Railway Co.*, 67 Iowa, 150; *Kitteringham v. Railway Co.*, 62 Iowa, 285; *Smith v. Hickenbottom*, 57 Iowa, 733; *Allen v. Railway Co.*, 57 Iowa, 623; *Muldowney v. Railway Co.*, 39 Iowa, 622; *State v. Felter*, 25 Iowa, 67. The distinction between questions which do not usurp the functions of the jury and those which do is pointed out in *Sachra v. Town of Manila*, 120 Iowa, 562." No cases have been cited by appellee's counsel which depart from these rules, and we know of no departure save perhaps to a modified extent in insanity cases. *Vide*, *Glass v. Glass*, 127 Iowa, 650; *In re Overpeck's Will*, 144 Iowa, 402; *Mileham v. Montagne*, 148 Iowa, 476; *State v. McGruder*, 125 Iowa, 741; *Searles v. Insurance Co.*, 148 Iowa, 76.

Having so many times announced the rule for this state, and finding it well supported by decisions in other jurisdictions, we do not feel like changing it at this time; thus introducing confusion in the cases. As defendant very strenuously contends that there was no such shock or jar of the train as would have produced the injury claimed by plaintiff, the opinions of these experts as to the probable cause of injury, if erroneous, were manifestly prejudicial, and as said by Hand, J., in *Ill. Central v. Smith*, *supra*:

"It is apparent from the questions and answers and the rulings of the court that the opinions of the physicians took the form, not of opinions as to how the injury might have been produced, but of direct testimony as to how it occurred and what caused it, which was the very question which the jury were called upon to decide. In view of the evidence, which was in irreconcilable conflict upon the questions as to how the injury occurred, the testimony of the physicians necessarily had great weight with the jury in determining that question, and in all probability aided in producing a verdict in favor of appellee which otherwise might have been in favor of the appellant." We must not be understood as expressing any opinion regarding the merits of plaintiff's case. That question is for a jury under proper instructions. The real cause of the claimed injury should be found by a jury upon proper testimony, and should not be based wholly upon opinions of experts as to the cause thereof. Enough latitude is given, when they are asked, as to what might or might not have produced the injury. With such opinions before them, it was for the jury to find and determine from all the testimony what in fact did cause it.

Because of the error pointed out the judgment must be, and it is, reversed, and the cause remanded for a new trial.—*Reversed and remanded.*

BLAKESBURG SAVINGS BANK, Appellee, v. S. A. BURTON,
Appellant.

Negotiable instruments: GENUINENESS OF SIGNATURE: EVIDENCE. In this action upon a promissory note the evidence is reviewed and in conjunction with a comparison of signatures is held sufficient to show the genuineness of the signature to the note.

Appeal from Wapello District Court.—HON. C. W. VERMILLION, Judge.

would hesitate to find the fact from such comparison alone.

The decree of the lower court must be—*Affirmed*.

WILLIAM C. RUSSELL, F. A. BISHOP and KATE SWEENEY,
Appellees, v. SARAH RUSSELL, Appellant.

Divorce: JUDGMENT FOR ALIMONY: APPEAL: AMOUNT OF BOND: REFORMATION. On appeal from a judgment for alimony payable in monthly installments the appeal bond need not be for the full amount of the judgment, but liability on the bond may be limited to the amount which will accrue pending the appeal; and where the court fixed the amount of the bond to cover that portion of the judgment accruing pending appeal, but by mistake it was drawn to cover the entire judgment, it may be reformed to conform to the order of the court.

Appeal from Woodbury District Court.—HON. DAVID MOULD, Judge.

FRIDAY, OCTOBER 18, 1912.

SUIT to reform and cancel *supersedeas* bond, resulting in a decree as prayed. The defendant appeals.—*Affirmed*.

A. & J. A. Van Wagenen, for appellant.

T. G. Henderson, and Marks & Marks, for appellees.

LADD, J.—An action for separate maintenance was prosecuted by defendant against her husband, Wm. C. Russell, resulting in a decree requiring him to pay for her support \$80 on the 18th day of each month. The defendant therein perfected an appeal and applied to the district court to fix the amount of the *supersedeas* bond, and the court, Hon. John F. Oliver presiding, ordered: "That the

amount of the *supersedeas* bond herein be, and the same is fixed at, \$1,500; the filing of a *supersedeas* bond herein in the sum of \$1,500, with sureties to be approved by the clerk of this court; that all the proceedings upon the judgment and decree be stayed pending appeal."

The decree was affirmed February 7, 1911, and *procedendo* filed with the clerk of the district court February 6th following. All costs and alimony up to and including February 18, 1911, were paid by the defendant therein. The condition of the bond was that, "if the appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant on said appeal, and shall also satisfy or perform the said judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the Supreme Court may render or order to be rendered by the said district court, then this obligation to be void; otherwise to be and remain in full force and virtue." The plaintiffs, as principal and sureties thereon in this suit, prayed that the same be reformed so as to stipulate that, if all costs and alimony which shall accrue pending appeal and until *procedendo* be returned, in the event the decree be affirmed, the obligation shall be void, and also that bond be canceled as fully performed.

Application had been made by the sureties to the district court for an entry *nunc pro tunc*, and an order made February 18, 1911, finding that the order fixing the amount of the *supersedeas* bond should be corrected so as to express the ruling then made, and to read as follows: "It is further ordered that the *supersedeas* bond is to be given by the defendant and appellant, William C. Russell, for the purpose of staying the execution on the judgment herein, pending appeal and for costs, and said bond shall be further conditioned that if the defendant, William C. Russell, pay to appellee, Sarah Russell, all costs, judgment, and damages that shall accrue against said William C. Russell and in favor of the said Sarah Russell, in case the judgment ap-

pealed from shall be affirmed, up to and including the time of the return of the *procedendo* of the Supreme Court therein and the filing of the same, the *supersedeas* bonds to be void: otherwise to remain in full force and virtue."

On the hearing this *nunc pro tunc* entry was introduced in evidence, and Judge Oliver testified that in fixing the amount of the bond he computed the amount of alimony which would likely accrue pending appeal, and fixed the amount of the bond at double such sum and costs, and that at the time there was no dissent therefrom. The sureties testified that they were advised by counsel for Russell, before signing the bond, that their liability would not exceed \$700 or \$800; and one of them arranged with Russell to deposit the monthly payments in a bank for their protection, which he did. There was no objection to the evidence, and the court, as we think, rightly entered the decree as prayed.

Section 4128 of the Code reads: "No proceedings under a judgment or order, nor any part thereof, shall be stayed by an appeal, unless the appellant executes a bond with one or more sureties, to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal, and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When thus filed and approved, the clerk shall issue a written order requiring the appellee and

all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby, but no appeal or stay shall vacate or affect such judgment or order."

There was no occasion for staying execution on payment, other than those which likely would mature pending appeal; and the above statute seems to contemplate such a stay in saying that, "if the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone." Of course, the penalty named limits the liability; but the condition specified may be the portion of the judgment or decree to be performed pending appeal. The court so determined, as the *nunc pro tunc* entry, from which no appeal was taken, and must be regarded as a verity, clearly indicates. The evidence leaves no doubt but that the bond was intended to conform with this entry, but by oversight and through mistake was so drawn as to cover the entire decree. Appellant argues that in such a case the trial court should fix merely the amount of the bond based on what the entire judgment would amount to, and may not direct that certain portions of the judgment be paid in event of affirmance. We discover no reason for so construing the statute, especially when the purport of its language is the other way. This involves no hardship; for it secures payment of all sums maturing pending appeal, and interferes in no way with those maturing subsequent thereto. This court is committed to the doctrine that such a bond may be reformed. *Nourse v. Weitz*, 120 Iowa, 708.

We are of the opinion that the decree of the trial court in so doing is in harmony with the record; and it is.—*Affirmed.*

QUAKER CITY CUT GLASS COMPANY, Appellant, v. C. A. WEBBER, doing business under the name and style of C. A. WEBBER PUBLISHING AND ADVERTISING COMPANY, Appellee.

Sales: ACTION FOR PRICE: BURDEN OF PROOF. In an action for goods sold and delivered, to which defendant answered by a general denial, the burden was upon plaintiff to prove that he sold or furnished the goods to defendant at his request, the nature or description of the same, the agreed price, or, in the absence of an agreement, the reasonable value of the goods.

Appeal from Johnson District Court.—HON. R. P. HOWELL, Judge.

FRIDAY, OCTOBER 18, 1912.

THE opinion states the case.—*Affirmed.*

W. J. Clair, for appellant.

Remley & Calkins, for appellee.

WEAVER, J.—The petition is at law, and alleges that between certain named dates the plaintiff “furnished the defendant goods, wares, and merchandise to the value of \$353 at his instance and request,” on which claim or account a payment of \$16.17 is credited, and judgment demanded for the remainder, with interest. The petition neither contains nor refers to any further statement of the account; nor is there any statement or showing as to the character or nature of the goods so sold, or the items or the prices thereof, except in the aggregate as above quoted from

the pleading. The answer is a simple denial of each and every allegation in the petition. This denial cast upon the plaintiff the burden of showing that he had sold to the defendant, or furnished at his instance or request, something in the nature of goods, wares, or merchandise, the nature or description of the same, the quantity or quantities thereof, and the agreed prices, or at least the reasonable values, of the articles or things so furnished. Of all this there is not a word to be found in the abstract.

So far as appears, the entire effort of the plaintiff was directed to the introduction of certain letters bearing dates since the alleged sales were made, and purporting to have been written by the defendant. The genuineness of these, or most of them, was denied by the defendant, and the chief complaint of the appellant is with reference to the trial court's ruling upon their admissibility. We think, however, there is no occasion for considering the questions so raised; for, were we to hold that every letter offered was competent testimony, there would still be nothing upon which to sustain a verdict in plaintiff's favor. These letters, or some of them, could be interpreted as admissions that defendant was owing plaintiff something, the amount of which is not stated; and in each instance the concession is accompanied by protest against the correctness of plaintiff's demands, and asking an explanation of the same, and on one or two occasions there is an offer of compromise by turning over negotiable paper held by defendant. Giving this testimony its utmost weight in favor of plaintiff, it shows nothing more than a probability that defendant was indebted to plaintiff in some indefinite or uncertain amount, for the ascertainment of which he neither introduced nor offered evidence of any kind.

If any error is shown in the proceedings below, it is without prejudice to the appellant, and the judgment below is—*Affirmed.*

CITY OF KEOKUK and JAMES CAMERON, SR. v. H. J. KENNEDY as Treasurer of LEE COUNTY, IOWA, and WILLIAM REIMBOLD, his Deputy, and LEE COUNTY, Appellants.

Municipal corporations: COMMISSION FORM OF GOVERNMENT: POWERS.

- 1 Cities, including those organized by special charter, adopting the commission form of government retain the powers previously exercised.

Same: SPECIAL CHARTER CITIES: BRIDGE TAXES. A county has no
2 authority to levy a bridge tax on property within special charter cities, but such cities have exclusive power to levy such taxes to be expended for bridge purposes within their limits; and this right is not affected by adoption of the commission form of government.

Appeal from Lee District Court.—HON. HENRY BANK, JR., Judge.

FRIDAY, OCTOBER 18, 1912.

THE facts are stated in the opinion.—*Affirmed.*

Joseph R. Frailey and George B. Stewart, for appellants.

Hollingsworth & Blood, for appellees.

SHERWIN, J.—The city of Keokuk was a special charter city until it organized under the commission plan in 1909. For more than twenty years, while it was operating under its special charter, and until 1910, it had had control of the bridges within its boundaries, and had levied for the purpose of their construction and maintenance such

taxes as were necessary therefor. In September, 1910, the board of supervisors of Lee county levied a tax for bridge purposes on the property within the limits of the city, and this suit in equity was thereupon brought to enjoin the collection thereof, and asking that the same be canceled. The case was tried on an agreed statement of facts, and a decree was entered for the plaintiffs.

Section 1056-a25 of the Supplement to the Code, as amended by section 7 of chapter 64 of the Acts of the Thirty-Third General Assembly, provides, and we have so held, that cities acting under the commission plan of government shall have, among others, the same powers that they theretofore had. *Sims v. City of Des Moines*, 146 Iowa 410; *Eckerson v. Des Moines*, 137 Iowa, 452.

So that the ultimate question for our present determination is whether property within the limits of Keokuk, while it was a special charter city, was subject to a bridge tax levied by the board of supervisors of the county for general county purposes. Code, section 758, relating to cities of the first class, is as follows: "Cities of the first class shall have full control of the bridge fund levied and collected as provided by law, and shall have the right to use the same for the construction of bridges, culverts, and approaches thereto, repairing the same, and paying bridge bonds and interest thereon issued by such city, and shall be liable for defective construction thereof, and failure to maintain the same in safe condition as counties now are with reference to county bridges; and no county shall be liable for any such bridge or injuries caused thereby." This section in express terms gives to cities of the first class full control of the bridge fund levied and collected as provided by law on the property within their limits, and the further right to use such money for the construction of bridges and culverts. The city is therein made liable for the defective construction

1. MUNICIPAL
CORPORATIONS:
commission
form of
government:
powers.

2. SAME:
special charter
cities: bridge
taxes.

thereof and for a failure to maintain the same, and the county is expressly exempted from liability for injuries caused by a failure of the city to properly construct and maintain. The authority conferred on a city of the first class by this section is broad, and, if it stood alone, it would be ample authority for holding that the county had no right to levy a bridge tax on property within the limits of a city of the first class. Full control of the bridge fund levied on such property is given, and the right to construct and maintain bridges is given, and liability for failure to properly construct and maintain is therein imposed. In order to give cities still more complete control over the bridges within their limits, section 888 provides that cities of the first class may annually levy a tax not exceeding three mills on the dollar, to be known as the "city bridge fund." In this connection, it is worthy of note that section 888 fixed the limit of the levy at the exact amount that is fixed for a general county levy by paragraph 4 of section 1303 of the Code, and it is further well to call attention to the fact that it has been the policy of the lawmakers from the earliest history of the state to limit the levy for bridge purposes to not more than three mills on a dollar. Revision, section 710; Code 1873, section 796; Code, section 1303.

The rights and powers of cities of the first class in relation to the control of bridge funds and the right to make a levy for such fund were conferred upon cities acting under special charter by sections 958 and 1004 of the Code. Section 958 provides that section 758 shall be applicable to cities acting under special charter, and section 1004 makes the same provision as to section 888. Section 1303 expressly provides that the county shall not levy a bridge tax upon any property assessable within the limits of any city of the first class, and appellants contend that, because cities of the first class are alone named as within the prohibition, the property within the limits of all other

cities is subject to a general county levy. This express limitation on the power of the board of supervisors first appears in section 1303. Before the enactment of this section, cities of the first class had been given power to levy a tax for bridge purposes within their limits, and had been given full control of all bridge funds levied by law on property within their limits, and as to these matters, cities acting under special charter had long before been given all power that was possessed by cities of the first class, and we are of the opinion that it was not the intent of section 1303 to authorize the county to levy a tax of three mills on a dollar upon all property within the corporate limits of cities acting under special charter, in addition to the three-mill levy which such cities were already authorized to make. The limit of such taxation had always theretofore been three mills on a dollar upon all property within the county, whether it was within or without the limits of cities of the first class or cities acting under special charter, and we do not believe that the Legislature in enacting section 1303 intended to authorize a levy of six mills on a dollar upon property in special charter cities. To give the section such a construction would be to repeal by implication sections 758, 888, 958, and 1004, and such repeals are not favored. Reading all of the sections referred to together, we are satisfied that section 1303 did not intend to authorize the county to levy a bridge tax on property within special charter cities, and, if this conclusion is right, the city of Keokuk still has the same rights relative to its bridge matters as it had when acting under special charter. Sections 758 and 888, in our judgment, gave to cities of the first class the exclusive right to levy a tax for bridge funds on property within their limits, and section 1303 added nothing to this power, because, in the absence of the clause thereof exempting the property of cities of the first class from a bridge levy by the county, the other parts of the section would necessarily have to be construed

in connection with the exclusive power given to such cities by sections 758 and 888. Our conclusion is that the judgment of the district court is right, and it is therefore—*Affirmed.*

B. F. JONES, Appellant, v. F. T. HUGHES.

Injunction: RESTRAINING PROCEEDINGS IN ANOTHER STATE. Courts of equity of this state have power to render decrees *in personam* restraining a defendant from proceeding in the courts of another state, where some evasion of the laws of this state intended to regulate the relations of its citizens to each other in some definite manner is threatened; but they are reluctant to interfere with the unquestioned right of a citizen to enter the courts of another state to secure such rights as may there be available to him, and will not scrutinize his motives in so doing.

Same. The fact that a resident of this state may secure some advantage in another state, by bringing his suit against a resident defendant in that state, is not ground for equitable interference with the right to sue in any court having jurisdiction and competent to afford relief.

Same. The mere bringing of suit against a resident defendant in another state, and the attachment of property situated there, is not such unjustifiable annoyance and harassment as to warrant an interference by the courts of this state.

Same: MULTIPLICITY OF SUITS. Equity will not interfere by injunction to restrain causeless and vexatious litigation; nor does its jurisdiction to prevent a multiplicity of suits apply to the repetition of a suit.

Same: REMOVAL OF CAUSES: ABATEMENT. The statute authorizing the removal of a cause to the county of defendant's residence has no application to a suit brought in another state; and can not be construed so as to prohibit the bringing of a suit in another state. Nor do the provisions for abatement of actions on the ground of another action pending apply to an action pending in another state.

Appeal from Lee District Court.—HON. W. S. HAMILTON,
Judge.

MONDAY, OCTOBER 21, 1912.

THIS is an action in equity to enjoin the prosecution by defendant against plaintiff of a suit, aided by attachment, in a court of Missouri to recover damages for slander and malicious prosecution for words spoken and acts done in Lee county of this state, of which county the plaintiff and defendant are both residents. After the filing of an answer, the court, on motion, dissolved a preliminary injunction which had been granted on plaintiff's application, and from such order the plaintiff appeals.—*Affirmed.*

Herminghausen & Herminghausen, B. F. Jones, and Bernard A. Dolan, for appellant.

Hughes & McCoid, for appellee.

MCCLAIN, C. J.—The case as presented involves the question whether a court of equity in this state may, in a suit by a citizen of the state brought against another citizen of the state, enjoin the prosecution in a court of another state of an action to recover damages for personal wrongs committed in this state. In order to discuss this question with reference to its proper solution under the facts appearing in this case, the following statement of the circumstances will be sufficient:

In November, 1909, an action entitled "R. C. McIlwain and Felix T. Hughes v. William Sinton, B. A. Dolan and B. F. Jones" was brought in the superior court of the city of Keokuk, in which it was alleged that the defendants, conspiring together and acting jointly and severally to injure the good name of the plaintiffs, maliciously prosecuted a suit in said court, which was afterwards dismissed, and spoke of and concerning the plaintiffs certain false and slanderous words. In April following, and while the action in the superior court at Keokuk was still pend-

ing, Felix T. Hughes, as sole plaintiff, instituted an action added by attachment against B. F. Jones as sole defendant in the circuit court of Clarke county, Mo., alleging substantially the same wrongs, and asking the recovery of the same damages as were made the basis of the action in the superior court of Keokuk. Under the attachment land of the defendant was seized in Missouri. Thereupon B. F. Jones, the sole defendant in the action brought in Missouri and one of the joint defendants in the action instituted in the superior court of Keokuk, brought this action in equity against Felix T. Hughes, the sole plaintiff in the action brought in Missouri and one of the joint plaintiffs in the action brought in the superior court of Keokuk to enjoin said Felix T. Hughes from maintaining his action in Missouri, alleging as ground for such relief the pendency of the action in this state; that both he and defendant are residents of Keokuk; that plaintiff has unincumbered property in that city of considerable value; that the cause of action alleged in the Missouri court was based solely upon facts that happened and arose in Lee county (in which the city of Keokuk is situated); that by the laws of Missouri the attachment upon the plaintiff's land there situated had become effectual as a lien without the giving of any bond, and that defendant instituted said action and obtained said attachment against the plaintiff's land in Missouri for the sole purpose of harassing, annoying, and worrying the plaintiff by putting him to great expense in defending said action in another state; and further, that the object of instituting the action in Missouri was to take advantage of a rule of law recognized in the courts of Missouri by which a recovery could be had for malicious prosecution which could not be had by the rules of law recognized on the same subject in the courts of Iowa. On the prayer of the plaintiff a preliminary injunction was granted; whereupon defendant answered under oath, denying any intent or purpose of harassing and annoying the plaintiff by the institu-

tion of the suit in Missouri, and denying that the rules of law recognized in Missouri with reference to the recovery of damages for malicious prosecution were any more favorable to the plaintiff in such a suit than those recognized in the courts of Iowa. There are also allegations in the answer as to the joinder of plaintiffs and defendants in the action in the superior court of Keokuk, which are not material in the view which we take of the case. On the filing of his answer, the defendant moved to dissolve the preliminary injunction for various reasons, which, so far as it is necessary to notice them, relate to the jurisdiction of the courts of one state to interfere with the prosecution of actions between its own citizens in another state and the propriety of doing so under the circumstances which are developed in this case. Although the appeal is one from the dissolution of a temporary injunction, the argument extends to the ultimate question of the right of the plaintiff to have the final relief prayed in his petition.

There can be no controversy as to the jurisdiction of a court of equity to render a decree *in personam* against a defendant enjoining him from resorting to the courts of another state. Such jurisdiction does not involve in any sense the exercise of a supervisory jurisdiction over the courts of another state, but only a supervisory jurisdiction over the acts of the defendant threatening injury to the plaintiff. Such power "proceeds from the undoubted authority that a court of equity possesses over persons within its jurisdiction to restrain them from doing anything that is contrary to equity and good conscience, to the wrong and injury of others, whether the threatened inequitable conduct consists in the prosecution of an action or whatever it may happen to be. The court of equity thus appealed to acts *in personam*, and it is immaterial whether the threatened inequitable conduct is to be carried on within or without the

1. INJUNCTION:
restraining
proceedings in
another state.

'limits of the jurisdiction." *Bigelow v. Old Dominion, etc., Co.*, 74 N. J. Eq. 457 (71 Atl. 153).

But conceding the jurisdiction of the court to thus enjoin, and bring within the control of its process, the prosecution of a suit in the courts of another state, the question still remains whether in a particular case the court should exercise that power. As expressing quite clearly the considerations that will control in this respect, we indulge ourselves in further quotation from the opinion of Chancellor Pitney in the case just cited, which was a case in which the New Jersey court of equity was asked to enjoin proceedings in a court of the commonwealth of Massachusetts having adequate jurisdiction to determine the rights of the parties in the case there pending. "But on general principles equity will not interfere with the right of any person to bring an action for the redress of grievance—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised. . . . They must be very special circumstances that will justify this court in restraining the prosecution of an equitable action already pending in a court of such ample jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of that commonwealth; that it can weigh evidence better or more justly apply to the facts any general principle of law or equity, nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth." The Chancellor then proceeds at considerable length to discuss the cases in which courts of equity have felt authorized to restrain the prosecution of actions in the courts of another jurisdiction, and concedes that they

have the power to do so on various grounds enumerated, among which are that the suit in the foreign jurisdiction is in contravention of the rights of creditors who are pursuing their remedies in the jurisdiction in which an injunction is asked, and that the defendant is resorting to a suit in a foreign jurisdiction in order to evade some distinct prohibition of the local law of the common domicile, or is attempting to unjustly harass or oppress his debtor to his irreparable injury.

Within these classes of cases fall nearly, if not quite, all the precedents relied upon for the appellant. Thus it has been held that a creditor will not be allowed to resort to another jurisdiction in order to defeat the benefits which are guaranteed to his debtor by the exemption laws of the state. *Teager v. Landsley*, 69 Iowa, 725; *Keyser v. Rice*, 47 Md. 203 (28 Am. Rep. 448). An attempt to evade the effect of the violation of a state statute as to the sale of patent rights was enjoined in *Sandage v. Studbaker Bros. Mfg. Co.*, 142 Ind. 148 (41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165). An attempt to evade the effect of the insolvent laws of the state was enjoined in *Dehon v. Foster*, 4 Allen (Mass.) 545. And to the same effect, see *Cole v. Cunningham*, 133 U. S. 107 (10 Sup. Ct. 269, 33 L. Ed. 538). In *O'Connor v. Root*, 130 Iowa, 553, it was held that the creditor of an estate might be enjoined from resorting to a foreign administration for the purpose of evading the distribution of the property of the estate through a local administration. In *Miller v. Gittings*, 85 Md. 601 (37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352), a resident of the state was enjoined from prosecuting a suit in another state on a contract which was void by express provision of the state statutes relating to gambling transactions.

But beyond the prevention of some threatened evasion of the specific laws of the state intended to regulate the relations of its citizens to each other in some definite man-

ner, courts have been reluctant to interfere with the exercise of the undeniable right of a resident to go into courts of another state to secure such relief as may there be available to him, and have not felt justified in scrutinizing his motive in doing so. Thus it has been held that a resident creditor may rightfully pursue his legal remedy by attachment of property for debt in another state. *Jenks v. Ludden*, 34 Minn., 482 (27 N. W. 188).

And it seems to have been uniformly held wherever the ground for invoking relief by injunction was that, according to the general rules of law and practice in another state, the plaintiff would secure some advantage which he would not have if suit were brought in the state of his residence, this is no ground for interfering with the generally recognized right to sue in any court having jurisdiction of the cause of action and competent to afford relief. *Royal League v. Kavanagh*, 233 Ill. 175 (84 N. E. 178); *Carson v. Dunham*, 149 Mass. 52 (20 N. E. 312, 3 L. R. A. 202, 14 Am. St. Rep. 397); *Edgell v. Clarke*, 19 App. Div. 199 (45 N. Y. Supp. 979); *Bigelow v. Old Dominion, etc., Co., supra*. In the Massachusetts case just cited the court expressly refers to and limits the application of the cases of *Dehon v. Foster*, 4 Allen (Mass.) 545, and *Cunningham v. Butler*, 142 Mass. 47 (6 N. E. 782, 56 Am. Rep. 657), previously decided by that court, and sometimes cited in support of a broader rule, to the circumstances involved in those cases relating to an attempt to defeat the operation of the insolvent laws.

While it has sometimes been stated in a general way that a resident creditor will be enjoined from resorting to the courts of another state for the purpose of annoying and harassing a resident debtor, we do not find any authority for holding that the mere bringing of suit against, and an attachment of property of a resident defendant in another jurisdiction constitutes such

2. SAME.

3. SAME.

unjustifiable annoyance and harassment as to warrant the intervention of a court of equity.

In this state it has been held that a court of equity will not interfere by injunction to restrain causeless and vexatious litigation, and that the jurisdiction of equity to prevent a multiplicity of suits does not apply to the case of the repetition of a suit. *Gray v. Coan*, 36 Iowa, 296. To the same effect, see *Patterson & Co. v. Seaton, Sheriff*, 64 Iowa, 115. We ought to say with reference to the case before us that we have nothing but the statements of the plaintiff by way of his own conclusions that the sole purpose of the defendant in instituting the suit in Missouri was to harass, annoy, and worry the plaintiff by putting him to great expense, and compelling him to employ counsel, and bring his witnesses from the county of his residence into the county of Missouri in which the suit was instituted, and that these allegations are denied by defendant in his answer under oath, coupled with the statement that the county of Missouri in which the action was brought adjoins the county of the residence of the parties in Iowa.

Some other points made by counsel for appellant in argument may be briefly noticed. The statutory provision for removal of cases to the defendant's county of residence in this state when brought in another county of the state, such removal to be at the expense of the plaintiff on defendant's motion (see Code, section 3504), plainly has no bearing on the question now before us, as it would be impossible to remove to the county of defendant's residence a suit brought against the defendant in another state. The statutory provision can not be construed into a prohibition of the bringing of an action in the courts of another state against a resident of a county of this state. There was some effort to make it appear that this defendant instituted the suit in Missouri for the purpose of evading the statute of limitations; but the conten-

4. SAME:
multiplicity of
suits.

5. SAME:
removal of
causes:
abatement.

tion is without merit. The suit in the superior court of Keokuk was instituted within the statutory period, and was still pending when suit was brought in the Missouri court; and the later action was instituted by suing out an attachment before the bar of the Iowa statute had accrued. There is no indication, therefore, of a purpose to evade the statute of limitation of this state. The objection that, when the action in Missouri was instituted, there was an action pending in this state to recover damages for the same wrongs, is without force.

The statutory provisions with reference to abatement on the ground of another action pending have no application to actions in another state. *Schmidt v. Posner*, 130 Iowa, 347. The objection is unfounded, in fact, for the reason that it appears that the defendant had caused the action in the superior court of Keokuk to be dismissed before the motion to dissolve the preliminary injunction was made.

No good reason appears in the record why this defendant should not be allowed to maintain his action in Missouri to secure any relief available to him there as against this plaintiff, and the trial court did not err therefore in dissolving the preliminary injunction.—*Affirmed*.

McCORMICK & McCORMICK, Appellants, v. THE DUMBARTON REALTY COMPANY.

Attorneys' liens: APPLICATION OF STATUTE: OCCUPYING CLAIMANT'S ACTION. The attorneys' lien law does not apply to actions under the occupying claimant's statutes; as there is no money due the adverse party, within the meaning of the lien law, which will support the lien. The claim in such cases may be satisfied either by the claimant paying the value of improvements and taking the property, or upon his refusal to pay he may permit the other party to take his interest in the property, or they may become tenants in common of the entire property, but the court has no power to render a personal judgment against the owner of the land, or to order it sold to satisfy the claim, thus creating a fund to which the lien would attach.

Appeal from Woodbury District Court.—HON. WM. HUTCHINSON, Judge.

MONDAY, OCTOBER 21, 1912.

ACTION to recover attorney's fees under Code, section 321. A demurrer to the petition was sustained, and, the plaintiffs electing to stand on their petition, it was dismissed, and they appeal.—*Affirmed.*

McCormick & McCormick, pro se.

E. J. Stason, for appellee.

SHERWIN, J.—Plaintiffs herein were attorneys for several parties who brought suits against the defendant herein under the occupying claimants statute (chapter 7, title 14, of the Code). After suit, and after notice under section 321, the defendant settled with some of the parties without paying the claims of the plaintiffs. The question for our determination is whether an attorney is entitled to a lien for services rendered in an action to establish the respective rights of plaintiff and defendant under the occupying claimants statute. Code, section 321, provides: "An attorney has a lien for a general balance due upon . . . (3) Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney. . . ." The plaintiffs seek to establish their lien on the ground that there was money due their clients from the defendant, as the term is used in section 321. Title 14, chapter 7, of the Code, relating to occupying claimants, provides:

Sec. 2965. Such petition must set forth the grounds

on which the defendant seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried as in ordinary actions, and the value of the real estate and of such improvements must be separately ascertained on the trial.

Sec. 2966. The plaintiff in the main action may thereupon pay the appraised value of the improvement and take the property, but if he should fail to do this after a reasonable time, to be fixed by the court, the defendant may take the property upon paying its value, exclusive of the improvements. If this is not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the real estate, including the improvements, each holding an interest proportionate to the values ascertained on the trial.

The statute gives an attorney a lien for money due his client in the hands of the adverse party. The word "due" has a variety of meanings, depending on the connection in which it is used. *Feaser v. Feaser*, 93 Md. 716 (50 Atl. 406). It is not always used in the sense of "mature," but may be applied to all claims, whether due, to become due, or contingent. *Barto v. Stewart*, 21 Wash. 605 (59 Pac. 480). But we think it the general rule that money is never due, in any sense of the word, unless the claim is such that the adverse party may be compelled to pay the same in the future. *Ames v. Ames*, 128 Mass. 277; *Bishop v. Young*, 17 Wis. 46.

If it be conceded, for the purpose of this case, that the statute under consideration should be so construed as to give an attorney a lien on all the money in the hands of the adverse party, which will be absolutely payable in the future, no lien can be established in this case, because, under the occupying claimants statute, any claim that may finally be established is not absolutely payable in money. There are three ways by which the claim may be satisfied, and the first of such ways is purely optional with the ad-

verse party. He may pay the value of the improvements and take the property, but this he is not bound to do; he may refuse to pay such sum and let the other party take his interest in the property; or the parties may become tenants in common of the real estate, including the improvements. The court has no authority, under the statute, to render a personal judgment against the owner of the land; nor is there authority to order the land sold under special execution to satisfy the claim. *Dungan v. Von Puhl*, 8 Iowa, 263; *Lindt v. Uihlein*, 116 Iowa, 48. In *Lindt v. Uihlein* we said that these proceedings were in the nature of an assertion of a lien upon the property by the party in possession, accompanied by the right to retain such possession until the lien is satisfied; that such possession need not be surrendered until the claim is satisfied, but that "possession once lost, except by force or fraud, the lien is lost." The statute gives a lien on "money due," and not on real estate, although real estate may be the subject of the litigation. *Keehn v. Keehn*, 115 Iowa, 467; *Kauffman v. Phillips*, 154 Iowa, 542. We are of the opinion that there was no "money due" the plaintiffs' clients, within the meaning of the statute, and that the judgment should be affirmed.

WESCO SUPPLY COMPANY, Appellant, v. THE INCORPORATED
TOWN OF ALLERTON, IOWA, Appellee.

Sales: PASSING OF TITLE. As a general rule the title to personalty passes upon delivery and acceptance, even though the purchaser has the option upon inspection to rescind and return the property; but where anything remains to be done by the parties, either by way of identification, or to its kind or quality, or the sale is upon approval or test the title does not pass until the approval is given or the test made.

Same: INTENT OF PARTIES: EVIDENCE. The real question in deter-

2 mining whether title to personalty has passed is the intent of the parties, to be gathered from their contract, acts and conduct with reference to the transaction; and this is generally a question of fact for the jury. In the instant case the evidence is held to justify a finding that it was the intent of the parties that title should not pass until a complete test was made to ascertain whether it was of the kind bargained for, and that this condition was not waived.

Appeal from Wayne District Court.—HON. H. K. EVANS,
Judge.

MONDAY, OCTOBER 21, 1912.

ACTION at law to recover for goods sold and delivered. Defendant admitted purchasing the goods, but denied acceptance or delivery. The case was tried to the court without a jury, resulting in a judgment for defendant, and plaintiff appeals.—*Affirmed.*

Poston & Murrow, for appellant.

Miles & Steele, for appellee.

DEEMER, J.—Desirous of supplying the defendant town with an electric light plant, the town council entered into a contract with plaintiff for the purchase of a producer gas engine with its equipment, a fifty kilowatt generator with proper appliances, and the necessary poles and material for distributing the light. By the terms of the agreement: "Successful bidders for generators shall, at their own expense, furnish all apparatus necessary for the complete testing of such machines, and make the necessary test under the direction of the engineers for the town of Allerton, Iowa, to see that the performance of each machine is according to the specifications of the American Institute of Electrical Engineers, revised June 7, 1907, and approved June 21, 1907. . . . Notice is hereby given to all

bidders that the following method of payment under these specifications on material contracts will be observed: Fifty percent of the contract price will be paid to bidder as soon as the material has been received in good condition on cars Allerton, Iowa, and the remaining fifty percent will be paid as soon as the material can be erected and tested out." As to the generator the contract also provided that: "The acceptance of this machine on the part of the town of Allerton is solely on condition that after having been tested, the machine is found to fully meet all conditions of the temperature test or it shall be removed by the town and will be at the order of the bidder and no suit or action shall be maintained against the town of Allerton by reason of the rejection of the machine, should it fail to meet the conditions specified."

The materials called for by the contract were supplied and put in place about September 1, 1910, and shortly thereafter an attempt was made to test it; but, on account of a hot bearing in the crank of the engine, it was not completed. Upon this partial test a leak was found in the generator, and, as defendant used the machine after this partial test, this leak kept increasing. As the test was partial and unsatisfactory, plaintiff's representatives agreed to a further test in the future, and to come back on defendant's request. On September 29, 1910, the town clerk wrote plaintiff the following letter: "Allerton, Iowa, Sept. 29, 1910. Wesco Supply Co., St. Louis, Mo.—Gents: The final test of machinery for light plant will be made 3d and 4th of October, please have your man here Monday, Oct. 3d to see test. If machine is all right your money and deposit check will be sent you on proof of test. Yours truly, S. F. Shields, Clerk." On the night of October 3d, and before any final test was made, a fire occurred in the plant, and the generator was destroyed. Defendant had not paid for the generator, and this action is to recover the purchase price thereof.

The ultimate question is: Who should bear the loss of the destruction of the generator by the fire? Answer to this depends upon a solution as to where the title to the property was at that time. This is a mixed question of law and fact, depending in its last analysis upon the intention of the parties. Some rules of law are also involved.

As a general rule title to personal property does not pass so long as anything remains to be done by the parties. *Sempel v. Lumber Co.*, 142 Iowa, 586. The thing undone

may relate either to the identification of property or to its kind or quality—as where the purchaser reserves the right of inspection to determine whether the property is such as he bargained for. *Semple v. Lumber Co.*, 142 Iowa, 586; *Bogy v. Rhodes*, 4 G. Greene, 133.

As a rule, in a contract of sale upon approval or test, title does not pass until approval is given or the test had. *Davis Co. v. McHugh*, 115 Iowa, 415.

But there may be a sale with an option in the purchaser to rescind and return, and in such cases the general rule is that the title passes upon delivery. *Wind v. Iler*, 93 Iowa, 316. In other words, the mere right of inspection does not, as a rule, modify the general rule that title to personal property passes upon delivery and acceptance by the buyer. *Wind v. Iler*, 93 Iowa, 316; *Hunt v. Wyman*, 10 Mass. 198. If nothing more appears than a right to rescind and return the property, title passes upon delivery and acceptance by the buyer. See cases hitherto cited.

After all, however, the real question is the intent of the parties manifested by the terms of the written contract, if there be one, and the acts and conduct of the parties with reference to the transaction, and as a rule this is a question of fact for court or jury. *Wind v. Iler*, 93 Iowa, 316; *Welch v. Spies*, 103 Iowa, 389; *McClung v. Kelley*, 21 Iowa, 508; *Clark v. Shannon*, 117 Iowa, 645.

1. SALES:
passing of
title.

2. SAME:
intent of
parties:
evidence.

The trial court made a finding of facts and determined that the title to the generator did not pass until it was fully tested, and that, as no such test was made, the loss should fall upon plaintiff. It also found that defendant did not waive the test and is not estopped from insisting thereon because of the use of the generator after the partial test, and the only question for our determination is: Shall these findings be disturbed? It will be noted that, by the terms of the contract, plaintiff agreed to furnish all apparatus for a test, and that 50 percent of the purchase price was withheld until the material was tested out, and that this payment was dependent upon the material being tested. This clause in the contract is full of significance. Again, the parties undertook by contract to limit the effect of the acceptance of the generator. Again, just before the materials were finally put in place, one acting for the town wrote plaintiff the following letter: "The Wesco Supply Company, St. Louis, Mo.—Gentlemen: We beg to advise that you will be required to run a test upon the 50 K. W. generator supplied to Allerton, Iowa, on the 31st of September, as required by the terms of your contract with the city. Kindly advise us that your man will be on hand before or by that date, and that he will secure and provide the necessary resistances, etc., for the test. Failure to make this test on this date, will necessitate the making of the same by the undersigned, and whatever costs is incurred by the writer in making the test, will be deducted from the contract price of the equipment, if the same is found to be satisfactory. Kindly see that the discharge resistance noted in our recent letter to you is on hand by this date, as we are to close our connection with this work at this date, and such matters must be cleaned up. Very truly yours, By L. G. Knapp."

On the whole we think the trial court was justified in finding that it was the intent of the parties that title should not pass to the town until a full and complete test

was made, and that defendant did nothing to prevent that test. It is true that the goods were put in possession of the defendant, but it seems that this delivery was subject to the condition that the property should meet a subsequent test before final acceptance by the buyer. In this respect the case is much like *Cornell v. Clark*, 104 N. Y. 451 (10 N. E. 888); *Kitson Co. v. Holden*, 74 Vt. 104 (52 Atl. 271); *Charter Co. v. Bank*, 54 Neb. 743 (74 N. W. 1070).

The trial court was justified in finding that there was a sale upon condition and title did not pass until upon a test it was ascertained that the property was of the kind bargained for. Such seems to have been the construction put upon the transaction very like the one here before us by the Supreme Court of the United States in *Pope v. Allis*, 115 U. S. 363 (6 Sup. Ct. 69, 29 L. Ed. 393). See, also, *Sturm v. Boker*, 150 U. S. 312 (14 Sup. Ct. 99, 37 L. Ed. 1093); *Pike Electric Co. v. Richardson*, 42 Mo. App. 272; *Rumpf v. Barto*, 10 Wash. 382 (38 Pac. 1129); *Kahn v. Klabunde*, 50 Wis. 235 (6 N. W. 888); *Mowbray v. Cady*, 40 Iowa, 604.

The case is not one of sale or return, but really one of conditional sale, and in our opinion the trial court was right in finding that title did not pass until a final test was made or defendant did something to prevent the test. The cases upon these propositions are very numerous and will be found collected in 35 Cyc. pages 288, 289, to which reference is made. Defendant did nothing to waive the performance of the condition, and there is no such showing as amounts to an estoppel upon it.

It follows that the judgment must be, and it is—
Affirmed.

JERRY O'MARA, Appellant, v. NEWTON & NORTHWESTERN
RAILWAY COMPANY, Appellee.

Actions: DISMISSAL. The appointment of a receiver for one of the
1 parties after the commencement of an action is not ground for
its dismissal.

Same: DISMISSAL BY COURT. Where a cause had been continued by
2 agreement of parties to accommodate one of the attorneys, a
dismissal of the same by the court on its own motion, without
having previously made any order that it should be brought to
trial or it would be dismissed, and no trial notice having been
filed, was improperly entered.

Appeal from Jasper District Court.—HON. BYRON W.
PRESTON, Judge.

MONDAY, OCTOBER 21, 1912.

APPEAL by plaintiff from an order overruling an appli-
cation to reinstate on the calendar a cause dismissed for
want of prosecution.—*Reversed.*

Tripp & Tripp, for appellant.

Morgan & Korf, and *Dyer & Dyer*, for appellee.

LADD, J.—The petition, alleging injury to a horse by
collision with the defendant's train in a right of way where
it had the right to fence, was filed January 24, 1907, and
an amendment thereto October 17th followed. The answer,
a general denial, was filed the same day. The trial was
begun October 18th, and resulted in a judgment for \$350
October 29, 1907. The defendant appealed, and the judg-
ment was reversed November 19, 1908. 140 Iowa, 190.

Procedendo issued April 12, 1909, and was filed in the district court the next day; but the case was not placed on the calendar until October, 1909, term of court. Nothing was done with it at that term, and at the November, 1910, term there was a continuance because of no trial notice having been filed. No entry appears to have been made at the January, 1911, term; but on the first day of the April term following—that is, April 11th—the court, on its own motion, entered an order dismissing the cause for want of prosecution, and taxed the costs against the plaintiff. Counsel for plaintiff did not ascertain this until May 4th following, and on the next day G. M. Tripp, a member of the firm of Tripp & Tripp, orally requested the court to set the judgment aside and reinstate the cause on the calendar, saying that he had not learned of the judgment until the evening before; that the cause had been continued from time to time by agreement of parties; and that the plaintiff desired to try the case. The court required application to be made in writing, which was done May 9th, and, in addition to what was said orally, and the foregoing facts, recited that the attorneys for plaintiff resided at Colfax, a distance of twelve miles from the county seat; that the cause had been continued from time to time by agreement of parties, the defendant's attorneys having consented thereto on account of the condition of G. M. Tripp's eyesight; that his left eye had been seriously injured May 16, 1909; that his physician had advised him that to use his eyes much would endanger his eyesight, and did not permit him, until December, 1910, to read, and then he could do so but little before his eyes would blur, and since which time he has been able to do only a little reading. This showing was supported by affidavit and not contradicted. No order had been entered exacting that, unless the case were brought on for trial, it would be dismissed; nor had any trial notice been filed for the term at which the dismissal was entered. The court, in overruling the motion, assigned the following reasons

therefor: (1) The cause had been on the calendar many years. (2) No effort had been made to bring it on for trial, and it could not then be tried, as the jury had been discharged. (3) Court was tired of calling it, and the defendant had gone into the hands of a receiver appointed by the federal court.

The mere circumstance that a receiver had been appointed since the action was begun, of course, furnished no reason for its dismissal (*Weigen v. Insurance Co.*, 104

1. ACTIONS:
dismissal.

Iowa, 410), and undoubtedly the court could have relieved itself of the burden of calling this case without dismissing it. Indeed, the practice prevails in many counties of the state of not printing causes not noticed for trial on the bar docket more than once a year, and of dismissing for want of prosecution those running on the calendar longer than a period designated, in the absence of a showing of merit and excuse for delay. What may have been the practice of the court in Jasper county is not disclosed.

But, though the cause was promptly tried in the first instance, it had been pending since its reversal in November, 1908. The delay in the issuance of the *procedendo* and

2. SAME:
dismissal
by court.

docketing the cause is not explained. It is to be said, however, that defendant had taken no exception thereto. Thereafter the continuances were by agreement. It may be that, notwithstanding the condition of Mr. Tripp's eyes, he could have tried the case, or his partner have done so without him; but defendant's counsel evidently deemed his condition such as to justify them in acquiescing in his desire that the trial be postponed until he might participate therein without danger to himself, and we are of the opinion that the court should have recognized their right, in the absence of any order or rule of court to the contrary, to postpone the trial over the term. Had the court required in advance the disposition of this or of the causes generally which had been on the calendar for a defined period at that term,

thereby advising litigants of the necessity of trying their causes, or having dismissals for want of prosecution entered, appellant would have had no cause of complaint. But no order of the kind had been entered; and, as the parties had agreed upon a continuance, counsel had the right to suppose that this arrangement, in the ordinary course of business, would be recognized and prove effectual. Instead, without warning, the action was dismissed by the court on its own motion, and at a time when another action on the same cause might not be maintained owing to the statute of limitations. While recognizing the large discretion a trial court may exercise in the control of its calendar, we can not avoid the conclusion that its order and ruling in the case at bar, though not so intended, was somewhat arbitrary, and not to be approved.—*Reversed.*

SOPHIA H. CLAWSON, Appellant, v. EMMA WEBBER, et al.

Conveyances: MENTAL CAPACITY: BURDEN OF PROOF. In seeking to
1 set aside a deed on the ground of mental incapacity and undue influence the burden of establishing the incapacity is upon the plaintiff. In the instant case the evidence is held insufficient to show lack of mental capacity.

Same: UNDUE INFLUENCE: EVIDENCE. Neither the unreasonableness
2 of a will or conveyance alone, nor mere love and affection between parent and child is sufficient to show undue influence; nor will a consideration for the welfare and comfort of either parent or child establish such influence, or raise a presumption that it was exercised; although in cases where the testator or grantor was old and infirm, and reposed great confidence in a child, a transaction for the benefit of the child will be closely scrutinized, and he will be required to show its good faith. The evidence is held insufficient to show undue influence.

Appeal from Henry District Court.—HON. W. S. WITBROW,
Judge.

MONDAY, OCTOBER 21, 1912.

Suit in equity to set aside a deed on the grounds of mental incapacity and undue influence. Judgment for the defendants. Plaintiff appeals.—*Affirmed.*

J. C. McCoid, for appellant.

W. F. Kopp, for appellees.

SHERWIN, J.—Mrs. Wilhelmine Lucrode died on the 15th day of February, 1906, leaving four children surviving her, to wit: Sophia A. Clawson, the plaintiff in this action, Mrs. Pixley, who at the time of her death and for many years prior thereto lived in Kansas, Carrie Tovera, and Emma Lucrode. Mrs. Lucrode became ill on the 3d day of February, 1906. On the 10th day of February she executed a deed of her property in favor of Carrie Tovera and Emma Lucrode, and it is this deed that the plaintiff asks to have set aside, because of the mental incapacity of the grantor, and because of the undue influence of the grantees. We shall not attempt to recite any considerable part of the evidence received on the question of the grantor's mental capacity for years before, and at the time she executed the deed. A brief history of the family and our conclusion from the evidence will suffice so far as this branch of the case is concerned. Mrs. Lucrode had been a widow for a great many years. Mrs. Clawson, the plaintiff, was married and left home over thirty-five years before the death of Mrs. Lucrode. The greater part of this time she lived with her husband and family in Mt. Pleasant, where Mrs. Lucrode resided, and for several years immediately preceding her mother's death she lived on the back end of the same lot that her mother lived on.

After the marriage of Mrs. Clawson, she did not in any way assist in caring for her mother, nor did her mother

at any time live with her. For at least eight years prior to Mrs. Lucrode's death she and the plaintiff had not been on good terms. They did not visit or call on each other, nor did they have any communication of any kind. During this time the habits of Mr. Clawson and his son were not good, and did not meet the approval of Mrs. Lucrode, and Mr. Clawson had no more to do with Mrs. Lucrode than did his wife. At the time of Mrs. Clawson's marriage, the only property that Mrs. Lucrode owned was a little house and lot worth about \$400, with an indebtedness of about \$200. The family had before this time owned a home in Missouri, which was sold for \$250, and the proceeds thereof divided among the members of the family; Mrs. Clawson getting her share. Subsequent to the marriage of Mrs. Clawson for a number of years the daughters Carrie and Emma and their mother lived together, and supported themselves by sewing. Emma graduated from the public schools, and then attended the Iowa Wesleyan University at Mt. Pleasant for two years, graduating there in 1878. She earned her own way through school. After her graduation, she continued to do sewing with her mother and sister Carrie until 1882, when she began teaching in the Mt. Pleasant High School, where she taught about six years. She subsequently taught in the public schools of other cities and in a college located in Kansas. In 1883, while she was teaching in Mt. Pleasant, her mother bought a house and lot in Mt. Pleasant, for which she contracted to pay \$1,500 in installments, and soon thereafter the family moved into this house. Mrs. Lucrode lived there until her death. This property was practically paid for with money earned by the daughter Emma in teaching. In 1887 the two daughters, Carrie and Emma, and their mother, bought another lot in Mt. Pleasant for \$400, and received a joint deed. There was a building on this lot that was owned by a party other than the owner of the lot, and this building Emma bought. The property that Mrs. Lucrode owned

and deeded to her daughters on the 10th of February, 1906, was the property that she owned at the time of the plaintiff's marriage, the property that had been purchased in 1883 for \$1,500, had been principally paid for with Emma's money, and her one-third interest in the lot purchased in 1887 by herself and two daughters for \$400. The daughter Carrie was married somewhere about 1889, and for the ten years immediately preceding her mother's death she lived next to her on the same lot, where she and her husband conducted a restaurant. Carrie and her mother were always affectionate and friendly, and the relations existing between Emma and her mother were especially intimate. The record discloses but little in relation to the history of Mrs. Pixley, but, as neither she nor her heirs joined in this suit, the matter is not material.

The burden of proof is, of course, upon the plaintiff to show that Mrs. Lucrode was mentally incompetent to make the conveyance in question. To sustain this branch of her case, she relies principally on evidence

I. CONVEYANCES:
mental
capacity:
burden of
proof.

tending to show that some twenty years or more before the death of Mrs. Lucrode she was melancholy, and on one or two occasions attempted to commit suicide, and on the further fact that she for many years before her death refused to have any relations with the plaintiff or her family. The record discloses sufficient reasons for Mrs. Lucrode's conduct and bearing towards the plaintiff and her family. There was friction between them, and, if it be conceded that the conduct of Mrs. Lucrode was just as represented by the plaintiff, it would fall far short of proving mental incapacity to make a deed, or, in fact, anything more than settled ill feeling, resulting in occasional displays of temper. The evidence touching the question of attempts at suicide is not at all convincing, but, conceding that it is all true, it does not establish mental incapacity at the time the deed was executed. The evidence is practically conclusive that

Mrs. Lucrode was in full possession of her mental faculties up to the time of her death. Prior to her fatal illness, she had always been physically well, and while her sickness was severe and her decline rapid, she seems to have retained her mental vigor as fully as is usual. Two physicians of repute, who attended her, testify that she was in full possession of her mental faculties up to the last. Plaintiff attempted to show that deceased was physically very weak, and at least partly unconscious on the day that she executed the deed. That she was physically weak at that time is conceded by all, but the overwhelming weight of the evidence is that she was mentally active and bright.

II. The evidence relied upon to show undue influence in much weaker than that depended upon to show mental incapacity. Practically all there is of it is the claimed unreasonableness of the conveyance and the close relationship existing between the mother and her two daughters, the grantees. The conveyance was not unreasonable. So far, at least, as the daughter Emma is concerned, it would have been unreasonable for her mother to have made any disposition of the property that would have taken from her the fruit of years of hard labor in her mother's behalf. The plaintiff had no claim on the property. She had contributed nothing towards its accumulation, nor towards the support of her mother during the years of her poverty, and she certainly is in no position to complain because of the conveyance to Emma, nor because of the conveyance to Mrs. Tovera, for the reason that Mrs. Tovera was a true daughter and not a stranger in every respect but blood. In any event, the unreasonableness of a will or conveyance is not alone sufficient to show undue influence. *In re Townsend's Estate*, 122 Iowa, 246.

Mere love or affection between parent and child does not alone tend to show undue influence, nor does a careful consideration for the comfort and welfare of either establish such influence, or raise a presumption that it has been exer-

cised. *Hanrahan v. O'Toole*, 139 Iowa, 229; *Johnson v. Johnson*, 134 Iowa, 33; *Reeves v. Howard*, 118 Iowa, 121; *Mallow v. Walker*, 115 Iowa, 238. In cases where the testator or grantor was old and infirm and reposed especial confidence in his child, we have held that transactions resulting in benefit to such child will be closely investigated, and that in such cases the burden is on the grantee to show the *bona fides* thereof. *Reese v. Shutte*, 133 Iowa, 681; *Brant v. Brant*, 115 Iowa, 701. Without conceding that the condition of Mrs. Lucrode and the relationship existing between her and her daughters would bring this case within the rule last stated, we say that, if such were the case, the burden has been fully met by these defendants. The execution of the deed is shown to have been the deliberate and voluntary act of Mrs. Lucrode. The evidence also conclusively shows a delivery of the deed to the grantees immediately after its execution, and its acceptance by them.

This judgment is right, and it is—*Affirmed*.

THEODORE ZAPPAS, a Minor, by GEORGE SHEREOPULOS, his next Friend, v. CHRIST ROUMELIOTE, Appellant.

Master and servant: ISSUES: PLEADINGS: INSTRUCTIONS. In this
1 action to recover tips paid an employer by mistake, in which a settlement was pleaded by defendant, and in reply plaintiff pleaded that the settlement was procured by fraud and that he was a minor and had disaffirmed it, a failure to instruct as to the effect of the settlement was without prejudice to the defendant, where the jury found that the tips, were personal gifts to the plaintiff and that he had not contracted to pay them to defendant; as the action was not upon any contract requiring repudiation to entitle plaintiff to recover, and under the facts proven defendant could not avoid liability on any theory.

Same: COMPENSATION OF SERVANT: TIPS: BURDEN OF PROOF. Tips
2 given a servant, over and above the regular charge for the service, belong to the servant; and the burden is upon the employer to show a contract by which they were to be turned over to him.

Appeal from Woodbury District Court.—HON. DAVID MOULD, Judge.

MONDAY, OCTOBER 21, 1912.

THE facts are stated in the opinion.—*Affirmed.*

A. Van Wagenen, for appellant.

Alfred Haas, for appellee.

SHERWIN, J.—The plaintiff, a minor, was employed by the defendant in his shoe-shining emporium. He worked under a salary contract, and the wages agreed upon were paid him. During the two years of his service for the defendant, however, he was given tips by customers whose work he had done, and these daily tips were turned over to the defendant each night. This action was brought to recover back such tips. The case was tried to a jury, and a verdict was returned for the plaintiff, upon which judgment was entered, and the defendant appeals. Two defenses were interposed by the defendant: First, that there was an agreement between them that the tips should belong to the defendant; and, second, that there was a complete settlement at the end of plaintiff's service, which was evidenced by a receipt in full.

The first two counts of the petition were based on contracts which the plaintiff alleged that he had made with the defendant, and neither count involved the subject of tips. The trial court instructed on the bearing that the defendant's plea of settlement would have on these two counts, but did not refer to the plea of settlement in connection with count 5, upon which the claim for tips was based, and this is alleged as error. We are given no light on this matter by counsel for appellee. But the appellee

1. MASTER AND
SERVANT:
issues:
pleadings:
instructions.

pleaded in reply to defendant's answer that the receipt pleaded and relied upon by the defendant was obtained by fraud, and that, being a minor, he had disaffirmed any settlement or receipt. Under proper instructions the jury found that there was no contract between the parties as to tips, and that the tips were personal gifts to the plaintiff by patrons of the house. These findings are fully established by the evidence; and, accepting them as true, it is manifest that the defendant was not prejudiced by the court's failure to instruct on the question of settlement in connection with count 5. This count was not based on any contract, either express or implied, unless it be said that there was an implied contract on the part of the defendant to return to the plaintiff that which had been wrongfully exacted of him. But, if that be true, it was not a contract that would involve repudiation on the part of the plaintiff in order to maintain this suit. Indeed, the reverse of that would be true, and the only repudiation in the case would be that of the contract of settlement, which might deprive the plaintiff of the benefit of the implied contract to repay money wrongfully received; and such repudiation or disaffirmance of the settlement was conclusively evidenced by the claim made in this suit. And we see no way for the defendant to escape liability under the facts. The trial court instructed that the plaintiff could not recover on count 5, if he had entered into any contract to turn the tips over to the defendant, and the plaintiff was not permitted to affirm a part of his contract with the defendant and disaffirm another part thereof. It is a familiar rule that we will not reverse where no prejudice appears, or where a different result can not justly be reached.

We think the court was right in instructing that the plaintiff would be entitled to any gifts in the way of tips, over and above the regular charge for the service performed, given to him by patrons of the defendant's place; and that the burden of proof was on the defendant to show an agree-

ment on the part of the plaintiff to turn the tips over to him.

2. **SAME:**
compensation
of servant:
tips: burden of
proof. The plaintiff did prove that the tips were given to him as a gratuity, and were not intended for the defendant; and that was all that the law could require of him.

There is nothing in the record to indicate that the verdict was the result of passion or prejudice. On the other hand, we think it was fully justified by the evidence. The plaintiff was a young Greek, who had just come to this country. He knew nothing of our language for some time, and did not know for a year that the tips given to him were intended by the donors as gifts to him. The defendant demanded and received this money, and it is right that he should return it. The judgment is—*Affirmed*.

C. H. SMITH, Appellee, v. H. W. SUECHTING, Appellant.

New trial: DELAY IN FILING MOTION. Where the affidavits in support of a motion for a new trial were not filed for some time after the time for filing the motion had expired, although the motion itself was filed within the time, the court was justified in overruling the motion.

• **Same: NEWLY DISCOVERED EVIDENCE.** The court did not abuse its discretion in overruling a motion for new trial on the ground of newly discovered evidence, in an action for slander, where the proffered evidence was cumulative and only tended to establish the justification pleaded as to part of the admitted slanderous words used.

Appeal from Wapello District Court.—HON. F. W. EICHELBERGER, Judge.

MONDAY, OCTOBER 21, 1912.

ACTION at law to recover damages for an alleged slander. The plaintiff recovered judgment for \$500, and defendant appeals.—*Affirmed*.

Gilmore & Moon and J. A. Lowenberg, for appellant.

Jaques & Jaques, and Lloyd L. Duke, for appellee.

WEAVER, J.—The slanderous words which defendant is charged with uttering of and concerning the plaintiff are to the effect that, while in the employ of the defendant as an upholsterer, plaintiff had stolen goods from him; that plaintiff had collected money for the defendant and converted it to his own use; that plaintiff was a crook and thief, and consorted and had intercourse with lewd women. In answer to these allegations defendant admits that he did charge plaintiff with criminal acts as alleged in the petition, and avers that said charges are true. Further answering, he says that he was informed by various persons that his statements concerning the plaintiff were true, and that he had reason to believe their truth at the time he made them. In support of his pleaded justification, defendant introduced the testimony of one Dorn, who swore that on several occasions prior to the alleged slander, while he was employed by the defendant in a furniture store in Ottumwa, he, at the solicitation of the plaintiff, stole leather and upholstering goods of the property of the defendant and delivered them to the plaintiff. Later he says he confessed his theft to the defendant, and informed him of the plaintiff's complicity in the crime. Dorn further testified that some of the stolen goods were used by plaintiff in doing certain work for one McGrath, and defendant, as a witness in his own behalf, states that he examined the upholstering so done for McGrath, and swears that the material therein is like the stock he was handling, and that no other dealer in Ottumwa kept or sold such goods to his knowledge. No other witness was examined on behalf of the defendant. Plaintiff denied the story of Dorn in its entirety, and swore that the goods used in doing the McGrath job were purchased by him from dealers in the usual course of business.

Upon this showing the jury returned a verdict in plaintiff's favor for \$500.

The appellant has not included the court's instructions in his abstract, and we do not understand counsel as contending that there is any reversible error shown in the record of the trial; but error is assigned upon the overruling of a motion for new trial based upon the alleged discovery of new evidence tending to show that some of the goods used by plaintiff were stolen from the defendant. The verdict was returned November 5, 1910, and by order of court the time for filing motion for a new trial was extended until November 12, 1910. On the date last named the motion, without affidavits or other support, was filed. The affidavits appearing in the record in support of the motion were not made until about the 1st of December, 1910, and were not filed in court until a later date. The principal affidavit so relied upon is by the manager of a leather manufacturing establishment, to whom a sample of the material used in the McGrath job was submitted, and he avers that such material was not made until after the date when plaintiff claims to have purchased it in his business. The motion was properly denied for several reasons. It was not filed within the time given for that purpose. True the form or body of the motion was filed on the last day of the time granted, but wholly without any showing in its support; and the court could properly decline to consider the affidavits filed at a later date without its leave.

Even if we consider the affidavits as having been presented in time, the evidence so offered is purely cumulative. The defendant himself testified as an expert that the leather in question had not been manufactured at the time plaintiff claimed to have purchased it. Again, the defamatory words charged and admitted by defendant include an accusation of embezzlement of moneys collected, as well as an accusation

1. NEW TRIAL:
delay in
filing motion.

2. SAME:
newly dis-
covered
evidence.

of adultery. All of these grave imputations defendant admitted, and attempted to justify by alleging their truth—a defense in support of which he offered not a word of testimony. On neither of these issues did the alleged newly discovered evidence have any bearing whatsoever. It needs neither argument nor citation of authorities to sustain us in holding that the court did not abuse its discretion in denying the motion. Indeed, the case as made by the defendant himself renders it very clear that he indulged in vituperative abuse of the plaintiff to a reckless degree, and then as recklessly emphasized it by alleging the truth of the slander in every particular—a plea which he made no effort to sustain, save in a single particular. He who assumes that attitude against his neighbor has no just ground or complaint if the law of the land and a jury of his peers hold him to respond in substantial damages to the injured party. The verdict returned is by no means excessive. There is no ground on which we can properly disturb the judgment, and it is—*Affirmed*.

BANK OF HINTON, Appellant, v. E. J. SWAN, et al., Defendants, and FIRST NATIONAL BANK OF CHEROKEE, Interveners, Appellees.

Chattel mortgages: ORAL AGREEMENT: GARNISHMENT. A chattel lien may be created by oral agreement, and where the agreement is followed by a change of possession the property is not subject to attachment. Thus where a debtor orally agreed with a creditor and a third person to sell certain property and place the proceeds in the hands of the third party for the benefit of the creditor a lien was created; and when the fund passed to the third party it was in effect delivered to the creditor and was not subject to garnishment, even though a portion of the fund was received by him after service of garnishment.

Same: EXTINGUISHMENT OF LIEN. Chattel mortgage liens are extinguished by a sale of the property by agreement of the parties, and the mortgagee's rights thereafter are to the proceeds according to the agreement.

Appeal from Plymouth District Court.—HON. JOHN F. OLIVER, Judge.

TUESDAY, OCTOBER 22, 1912.

THE opinion states the case.—*Affirmed.*

E. T. Bedell, for appellant.

Herrick & Herrick, for intervener.

J. A. Miller, for appellee, Swan.

WEAVER, J.—The defendant Swan was indebted to the plaintiff Bank of Hinton as well as to the intervener First National Bank of Cherokee. The indebtedness to the intervener was secured by mortgage upon a considerable amount of personal property, and, in part, at least by landlord's lien. Prior to the commencement of this action, Swan held a public sale at which the property subject to the lien was disposed of at auction, and the proceeds thereof were received by one Stanoscheck, who acted as clerk of the sale. Thereupon the plaintiff bank brought an attachment suit upon its claim against Swan, and caused Stanoscheck to be served with notice of garnishment therein. In this action the Cherokee bank intervened, pleading its claims against Swan, and the liens by which they were secured, and alleging that the sale of said property was made under and in pursuance of an oral agreement between itself and Swan, by which the property should be put up and sold at auction for the benefit of the intervener. It further alleges that the said Stanoscheck was agreed upon and selected by the mortgagor and the intervener as the person who should act as clerk at said sale and should take and receive the proceeds thereof and turn the same over to the intervener to the extent of its claims against Swan.

In other words, it is claimed for the intervener that Stanoscheck's possession of said fund was and is for its benefit, and that the garnishment in plaintiff's favor is subject thereto. The claim is denied by the plaintiff, which insists as a matter of fact and of law that in permitting the sale of the property intervener waived its lien, and that such lien did not follow or attach to the proceeds of the sale in the hands of Stanoscheck. The trial court sustained the claim of the intervener and plaintiff appeals.

I. It may be conceded, as claimed by appellant, that Swan held the sale, and employed the auctioneer. It may also be conceded that the lien of a mortgage does not as a

1. CHATTEL
MORTGAGES:
oral agree-
ment: garnish-
ment.

matter of law follow or attach to the proceeds of a sale of the mortgaged property. But these concessions do not necessarily entitle plaintiff to the relief it asks in this action. Even if the intervener had no lien of any kind upon the property sold, yet if Swan was indebted to said bank and entered into an agreement with it by which he would make his sale, and have the proceeds thereof delivered to or placed in the hands of the clerk or other designated person to be by said person paid over to the bank, that person would hold such proceeds as bailee or trustee for the bank, and the fund would not be subject to garnishment at the suit of another creditor of Swan. In other words, even though the mortgage lien as such should not follow or attach to such proceeds it was competent for the parties to create a lien thereon by oral contract, and, possession having once passed to the third person for the use or benefit of the bank, it was equivalent to a delivery into the hands of the bank itself. Nor would the result be otherwise if as claimed some of the money or proceeds of the sale came into the hands of the clerk after the garnishment. The garnishing creditor can get no other or higher right to the fund in the garnishee's hands than the debtor himself had. The clerk's possession was such only as he

obtained by virtue of the agreement between Swan and the bank, and he never at any time received or held any of the proceeds of the sale for Swan, unless it should appear that there was an excess returnable to him after paying the claims of the bank—a condition which it is shown did not exist. There was no relation of creditor and debtor between Swan and the clerk who held the proceeds of the sale for the benefit of the intervener. Had Swan demanded them from Stanoscheck, the latter could not have rightfully surrendered them to him. Whether we say the receipt of the funds by Stanoscheck was in law a receipt by the bank, or that the arrangement made created a lien thereon in his hands for the benefit of the bank, the same conclusion must be reached—that the garnishing creditor gains no priority by its garnishment. See *Savings Bank v. Mowery*, 149 Iowa, 114; *Packer v. Crary*, 121 Iowa, 388; *Grumme v. Firminich Co.*, 110 Iowa, 507.

A chattel lien may be created by oral as well as by written contract. *Bates v. Wiggin*, 37 Kan. 44 (14 Pac. 442, 1 Am. St. Rep. 234); *Bank v. Jones*, 4 N. Y. 497 (55 Am. Dec. 290). This is particularly true where the agreement is followed by or accompanied with change of possession. *McTaggart v. Rose*, 14 Ind. 230; *Bardwell v. Roberts*, 66 Barb. (N. Y.) 433. Liens of this character are, of course, invalid as against attaching creditors without notice actual or constructive, but the delivery of possession to the lienholder or to a third person for his use is, under familiar rules, equivalent to notice. Here there was a change of possession. The garnishment itself proceeds upon the theory that the property has been sold, and that the proceeds of the sale have come into the possession of the garnishee. That possession we have seen was delivered to the garnishee for the use and benefit of the intervener, and became affected by that right in the very act of delivery. There was no interval of time in which the proceeds of the sale can be said to have been the property of

Swan free from the intervener's claim. In other words, there was never an instant of time when the plaintiff's attachment of the property or proceeds of the sale acquired or could acquire priority over the claim of the intervener. The cases cited by appellant—*Smith v. Bank*, 99 Iowa, 282, and other precedents of that class—do not control the issue here presented. In none of them was the property or money sought to be attached delivered to a third person designated and agreed upon to receive and apply it to the payment of the mortgage debt. Nor do we consider it a matter of material import that Swan undertook to pay for Stanoscheck's services in the matter. The vital question is, What was the nature of the services he was to perform? And upon this there is no substantial controversy. Counsel misapprehends the record in asserting that there was no contract or agreement between the bank and Stanoscheck. The abstract prepared by the appellant shows otherwise. Stanoscheck himself says that Swan, when soliciting him to act as clerk, said that the bank held liens upon the property, and that its consent would have to be secured. Later he was called into the bank where he was told that the sale could be made, and he could act as clerk on condition that he turn the proceeds into the bank to apply upon the claims secured by its liens. The bank officer, testifying as a witness, also says that he talked with Stanoscheck, who agreed to act as clerk under the arrangement by which the proceeds were to be turned over in payment of said claims.

II. Appellant makes the further point that the mortgages held by the bank were void because they included exempt property, and Swan's wife did not join in their execution. It is quite doubtful whether plain-

2. SAME:
extinguishment
of lien.

tiff as an attaching creditor is entitled to reap any advantage over another creditor by raising the question of exemption in behalf of a debtor who does not claim it for himself, but, as counsel himself says,

the validity of the mortgages is no longer a matter of special importance.

The liens, if any, upon the property, were extinguished by the sale, and the intervener's right in the premises is grounded upon the agreement by which the sale was made and the proceeds put into the hands of the clerk for its benefit. That agreement as we have already said was valid as between the parties, and, when the proceeds of the sale were delivered to the clerk in pursuance thereof, it became valid also as against attaching creditors.

Further discussion is unnecessary. Some questions of practice have been argued by counsel, and the sufficiency of the record presented by appellant has been objected to, but, in view of the conclusion we have reached upon the merits, we find it unnecessary to consider them.

For reasons stated, the judgment below is—*Affirmed*.

R. L. MORTLAND, Appellant, v. POWESHIEK COUNTY,
Iowa, Appellee.

Municipal corporations: LETTING OF CONTRACTS: RIGHTS OF LOWEST
1 **BIDDER.** Both the statute and an agreement by which public work is let to the lowest bidder are for the benefit of the taxpayers rather than that of bidders; and in the absence of fraud an unsuccessful bidder, although the lowest, has no remedy because not awarded the contract.

Same: REJECTION OF BIDS: PERSONAL LIABILITY OF OFFICERS. A board
2 of supervisors acts as a governmental agency in contracting for county work, and the supervisors are under no personal liability, in an action against the county only, for failing to let the contract to the lowest bidder.

Same: PLEADINGS. Allegations of wilfulness, neglect and wrong
3 on the part of supervisors in failing to let a contract to the lowest bidder are immaterial, where the action is not against the members of the board personally, and the right to reject a bid existed.

Same: PLEADINGS: AMENDMENT. An amendment to a pleading after

4 the sustaining of a demurrer which raises no new issues may properly be stricken on motion.

Appeal from Poweshiek District Court.—HON. H. E. WILCOCKSON and HON. JOHN F. TALBOTT, Judges.

TUESDAY, OCTOBER 22, 1912.

ACTION at law to recover damages from the county for failure of its officials to award a bridge contract to plaintiff; he being, as is alleged, the lowest bidder for the work. The trial court sustained a demurrer to the petition, and plaintiff appeals.—*Affirmed.*

J. M. Goodson and J. W. Carr, for appellant.

U. M. Reed, for appellee.

DEEMER, J.—According to the allegations of the petition, the board of supervisors of the defendant county, although not required by law so to do, undertook to let a contract for doing all the concrete bridge and culvert work for the county to the lowest bidder, and it is averred that plaintiff made the lowest bid therefor in response to advertisements made by the county officials, and that, notwithstanding his was the lowest bid, the board “wilfully, wrongfully, unlawfully, and in contravention of their said advertisement, invitation, promise and agreement made, in all as aforesaid, refused to let the contract to this plaintiff, who was the lowest bidder in fact, and let the contract to another contractor at a higher rate and price than that offered by plaintiff, against his protest and demand, which said work was done by another contractor during the year of 1910 to the amount of more than twenty-two thousand dollars, all to the damage and injury of plaintiff in the sum of more than \$2,000, no part of which has been paid, and is justly due plaintiff. That such damages are the reason-

able value of the profits to which plaintiff would have been entitled, and would have earned, under his bid aforesaid, had his bid been accepted and he been awarded the contract for said work."

A demurrer to this petition was sustained, and thereafter plaintiff filed an amended and substituted petition which did no more than specifically aver the damages claimed by him, although reference is made to certain plans and specifications prepared by him, which it is said were made at defendant's instance and request as a basis for competitive bidding. The theory of the action was not changed, however, and plaintiff did not ask in this amendment to recover for service performed. Defendant moved to strike this amendment for the reason that it tendered no new issue and the motion was sustained. The appeal is from the rulings sustaining the demurrer and the motion. It is conceded that there is no requirement of law that such contracts as are here involved shall be let to the lowest bidder, and it is true, we think, that the advertisement upon which plaintiff relies did not state that the contract would be let to the lowest bidder; but it is averred that the board orally agreed to award the contract to the lowest bidder. The motives of the board in awarding the contract are not impugned and no fraud is alleged.

In view of this record, but two questions arise: First. There being no law requiring the letting of such contract, is the county bound because of the failure of its board to let a contract to the lowest bidder for the work? Second. Assuming that the county is bound by the action of the board in submitting the matter to bids, is it liable in damages to the lowest bidder for not awarding him the contract?

These questions may be answered as one, for the solution thereof involves, as we think, but a single inquiry, to wit: For whose benefit is a law or agreement to let a contract for county work to the lowest bidder? Reason and

authority give but one answer to this quære, and that is

that it is for the benefit of the taxpayer.
 1. MUNICIPAL COR-
 PORATIONS:
 letting of con-
 tracts: rights
 of lowest
 bidder. In the absence of fraud, the unsuccessful
 bidder, although he be the lowest, has no
 remedy. The reason for this is twofold

—first, because the arrangement is not for his benefit; and,
 second, because the board has a discretion in such matters,
 and this discretion will not ordinarily be reviewed by the
 courts.

Again the board in such instances is acting as a
 governmental agency, and under the allegations of the peti-
 tion there would be no personal liability on
 2. SAME: rejec-
 tion of bids:
 personal liabil-
 ity of officers- their part. The questions here presented
 were before the New York Court of Appeals
 in *East River Co. v. Donnelly*, 93 N. Y. 557, and that
 court said:

If the defendants had found and decided, after such
 process of investigation and comparison as they thought
 necessary to make, that the plaintiff was in fact the bidder
 who answered the call of the statute, and, after that deter-
 mination, had refused to enter into the contract, a case
 would have been presented over which a court, even in
 favor of a private suitor, might perhaps have cognizance.
 The question is not before us. But here the plaintiff goes
 no further than to say that the defendants, knowing it was
 the lowest bidder and ready to comply with the statutory
 conditions, refused 'to award' the contract to it; that is, to
 adjudge in its favor. The argument of the plaintiff comes
 to this: If the defendants had judged or determined cor-
 rectly, or even honestly according to their knowledge, the
 contract would have been awarded to it. But as in coming
 to any conclusion, even ascertaining whether the plaintiff
 was the lowest bidder, they must act in a *quasi* judicial
 capacity, their conduct comes within the general rule of
 irresponsibility to which I have adverted. Moreover, the
 statute merely provides a scheme for the prudent admin-
 istration of the affairs of the city, and has imposed a duty
 upon the defendants to carry it out. This duty appears,
 from the plaintiff's showing, to have been violated. But

the duty is a public duty to the city or people at large, not to the plaintiff or for the benefit of individuals, or the promotion of any private interest, nor has the statute given to the plaintiff or any person an action for its violation.

See, also, as supporting the same view, *People v. Common Council*, 78 N. Y. 33 (34 Am. Rep. 500); *Colorado Paving Co. v. Murphy*, 78 Fed. 28 (23 C. C. A. 631, 37 L. R. A. 630); *State v. Board of Education*, 24 Wis. 683; *Board v. Gillies*, 138 Ind. 667 (38 N. E. 40); *Bloomfield v. Middlesex* (N. J. Sup.), 62 Atl. 116; *Bunker v. Hutchinson*, 74 Kan. 651 (87 Pac. 884); *Case v. Trenton* (N. J. Sup.), 68 Atl. 57; *Louisville Co. v. Gast* (Ky.) 115 S. W. 761; *Akron v. France*, 24 Ohio (C. R.) 63; *Talbot v. Detroit*, 109 Mich. 657 (67 N. W. 979, 63 Am. St. Rep. 604).

The allegations as to the wilfulness, neglect, and wrong on the part of the board add nothing to plaintiff's right as against the county. These would be material, if at all, were the action against the members of the board personally. *Chatfield v. Wilson*, 28 Vt. 49; *Barr v. Cubbage*, 52 Mo. 404; *Mahan v. Brown*, 13 Wend. (N. Y.) 261 (28 Am. Dec. 461). The reason for this is that, if the board had the right to reject the plaintiff's bid, the motives of the individual members are entirely immaterial if the action be brought against the county. As already observed, there are no allegations of fraud or conspiracy. Nothing decided in *Vincent v. Ellis*, 116 Iowa, 616, runs counter to these views. Without further elaboration, it is enough to say that plaintiff's original petition did not state a cause of action against the defendant.

The amended and substituted petition raised no new issues. There was no claim for work and labor done or for materials furnished, and no allegations of fraud or conspiracy, hence there was no error in striking it. The law of the case was settled by the ruling on the demurrer, and, as plain-

3. SAME:
pleadings.

4. SAME: plead-
ings: amend-
ment.

tiff's amendment added nothing material to the allegations of plaintiff's petition, it was properly stricken on motion.

No error appears, and the rulings and orders are approved, and the judgment must be, and it is—*Affirmed*.

FOUR TRACTION AUTO COMPANY v. RUDOLPH HURNI,
Appellant.

Sales: WARRANTIES: VARIANCE BY PAROL: PLEADINGS. The express
1 warranties of a written contract of sale can not be varied or added to by parol proof of oral representations, made preceding or contemporaneous with the written contract, and which in themselves amount to an express warranty. Thus in an action for the price of an article sold under a written warranty the defendant alleged that in negotiating the sale plaintiff orally represented that the article was what the defendant needed, that he relied upon the statements, that the article was not as represented and that the same failed to comply with the representations additional to written warranties, the court properly struck from the answer all such allegations as did not tend to plead an implied warranty that the article was not suitable for the purpose desired, and that it did not comply with the written warranties.

Same: EXPRESS WARRANTIES. To constitute an express warranty
2 it is not necessary that the word warranty be used; it is sufficient if the terms used import representations on which the seller intends the buyer may rely, and on which he does rely, that the article sold shall be of a certain character or that it will fulfill certain conditions.

Appeal from Woodbury District Court.—HON. WM. HUTCHINSON, Judge.

TUESDAY, OCTOBER 22, 1912.

THIS is an action to recover the purchase price of an automobile truck sold by plaintiff to defendant with a written warranty. In his answer the defendant pleaded

representations of the plaintiff with reference to the truck which were not met and complied with. On motion of plaintiff the provisions of defendant's answer alleging representations as to the character and capacity of the truck were stricken out by the court, and from this ruling and order the defendant appeals.—*Affirmed.*

Edwin J. Stason, for appellant.

Carter & Carter, for appellee.

McCLAIN, C. J.—The single question presented on this appeal, as stated by appellant, is whether one who enters into a contract to buy from a manufacturer a machine ordered for a particular purpose which is fully understood by the seller and under provisions for trial and return if the machine is not as represented may defend as against the action for the purchase price, after offering to return the machine, on account of breach of implied warranty as to fitness for purpose intended, although there is a formal written warranty, breach of the conditions of which is not shown. In short, counsel for appellant relies upon the proposition that without regard to breach of written warranty the buyer may rely as a defense in an action for the purchase price upon the breach of an implied warranty as to fitness or suitability of the article for the purpose for which it is designed, although there is an express written warranty, breach of which is not shown. We think, however, that the record does not raise the question argued by counsel for appellant, but a different question; that is, the admissibility of parol evidence to establish a warranty, different from and in addition to that contained in the written contract for sale. To make plain the exact point presented to the lower court, it will be necessary to briefly state the allegations of the petition and answer.

In the petition, it is alleged that, in pursuance of a

written contract embodied in certain letters which are set out, the plaintiff sold to the defendant a certain auto truck for \$2,000, with a specific written warranty, which truck was delivered to defendant, and judgment is asked for the agreed purchase price. The defendant in his answer admitted the making of the contract for the purchase of the auto truck, as alleged by the plaintiff, and the receipt by the defendant of the truck referred to in such contract and the alleged breach of the terms of the contract as to workmanship and material and in other respects. But the defendant also alleged that during the negotiations for the purchase of the auto truck "the defendant stated to the plaintiff . . . that he wanted a good, strong, durable truck and equipment that would stand the test of use in all kinds of weather and conditions of streets for the purpose stated, and in all the negotiations had by the defendant with the plaintiff, the plaintiff . . . represented to and assured the defendant that" the truck sold "was what the defendant needed, that it would answer his purposes, and that it was fully capable of doing the work required, and that it was a good, strong, durable truck of good material and workmanship." The defendant further alleged that when he gave the order for the truck, as set out in plaintiff's petition, "he relied upon the foregoing representations and warranties of the officers and agents of the plaintiff, and would not have ordered the said auto truck if the plaintiff had not thus warranted that the truck would meet his requirements, fulfill the purposes for which he desired an auto truck in every respect, and come fully up to the representations made." Further, the defendant alleged that on trial of the truck "it was found to be unsatisfactory, unreliable, and unsuitable for the purposes for which he desired an auto truck," and "that it was not in any respect a truck of the character that plaintiff . . . represented it to be." Defendant also alleged that, after

1. SALES: war-
ranties: vari-
ance by parol:
pleadings.

discovering that the truck did not comply with these representations, he refused to accept and pay for it, and returned it to the plaintiff in accordance with the provisions of the contract under which such return was authorized.

We think it is plain that, so far as defendant relied upon the failure of the truck to comply with the alleged representations of the plaintiff which were outside of and additional to the specific requirements of the contract of sale which was in writing, the defendant pleaded, not a breach of an implied warranty of fitness or suitability for a specific purpose, but a breach of an express warranty in addition to the warranty contained in the written contract of sale. Conceding the contention for the appellant that in sales of personal property there may be a warranty implied by law of the fitness or suitability of the article for the purpose for which it is intended, in addition to an express warranty against defects in workmanship and material, no such implied warranty is pleaded or relied upon in the portion of the answer stricken out. The defendant pleaded and relied upon express representations and warranties of the plaintiff outside of and in addition to those contained in the written contract. The court did not strike out the allegation in the answer that, after a fair trial of the auto truck, it was found to be unsatisfactory, unreliable, and unsuitable for the purposes for which he desired an auto truck, but only so much of the allegations of the answer as related to the failure of the truck to fulfill the representations by the plaintiff which were outside of and additional to the warranties contained in the written contract. It was therefore left open for the defendant to prove a breach of an implied warranty that the truck was suitable for the purposes for which it was bought, as well as that it did not comply with the warranties contained in such written contract. The ruling of the court simply denied defendant the opportunity of proving failure of the truck

to fulfill other warranties and representations than those contained in the written contract.

It is clear that failure of the article sold to conform to representations made by the seller, with the intention that they should be relied upon by the buyer, constitutes a breach of an express warranty.

To constitute a warranty, it is not necessary that the term "warranty" be used. It is sufficient that the terms used be such as to import a representation on which the seller intends that the buyer may rely, and on which the buyer does rely, that the article shall be of a certain character or fulfill certain conditions. But a warranty thus implied or inferred from the language used by the seller in representing the character and quality of the thing sold, is not an "implied" warranty, as that term is used with reference to a sale, but it is an express warranty. *Figge v. Hill*, 61 Iowa, 430.

The question raised, therefore, by the motion to strike out portions of the defendant's answer, was not whether breach of an implied warranty can be relied on as a defense notwithstanding the embodiment in a contract of sale of terms of express warranty, but whether the buyer can show by parol evidence the breach of other agreements of warranty than those found in the written contract of sale. That the terms of a written contract of sale constituting express warranties may not be varied or added to by parol proof of oral representations, preceding or contemporaneous with the written contract which contains express warranties is too well settled to require an extensive citation of authorities. The views of this court on this question have been fully expressed in recent cases. See, as directly in point on the proposition. *Electric Storage Battery Co. v. Railway*, 138 Iowa, 369; *Western Electric Co. v. Baerthel*, 127 Iowa, 467.

The ruling of the trial court was correct, and it is—
Affirmed.

B. BARNES v. W. M. ROBERTSON, Road Supervisor, J. H. RANGE and Other Trustees, and ANTHONY L. MAYER, Defendants and Appellees, and MARK CHURCHILL and LENA CHURCHILL, Appellants.

Highways: LOCATION: PRESCRIPTION: EVIDENCE. Where a highway
1 was unquestionably established at some point on the land in controversy, it will be presumed, in the absence of evidence to the contrary, that the traveled way and that improved by the public is where it was originally located. In the instant case the evidence is held to show, even if the highway was not regularly established in the first instance, that the public had acquired a right thereto by prescription, and that there had been a dedication and acceptance.

Same: ESTOPPEL. Where a property owner, because of a highway
2 crossing his land, obtained exemption from taxation of a strip for that purpose of a certain width, he was thereafter estopped to deny that the highway of that width.

Appeal from Washington District Court.—HON. K. E. WILCOCKSON, Judge.

TUESDAY, OCTOBER 22, 1912.

THE facts are stated in the opinion.—*Affirmed.*

Eicher & Livingston, for appellants.

Edmund D. Morrison, for appellee.

SHERWIN, J.—This is an action of mandamus, praying that the defendant road supervisors be required to remove obstructions consisting of fences and gates, maintained by defendants Churchill & Mayer in a highway where it crosses the S. 1/2 of section 3, township 74, range 9. After

trial on the merits, there was a decree for the plaintiff, and the defendants Churchill alone appeal.

The appellants are the owners of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 3, and the defendant Mayer is the owner of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the same section. The plain-

1. HIGHWAYS:

location: pre-
scription:
evidence.

tiff is the owner of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 74, range 9, and his house, where he lives, is on the west forty of his eighty. The section of road in controversy crosses the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 3 east and west, and the obstructions that are complained of are fences and gates that are located as follows: At the east and west lines of Churchill's south forty, and a little west of the west line of the Mayer forty. The appellants became the owners of their land by inheritance from their father, Joseph Churchill, two or three years before this action was tried, and their father became the owner of the south forty in 1878. Some time before 1858 a road had been established from a point south of the southwest corner of section 3, and running north of the section line between sections 9 and 10 and 3 and 4 to a point several rods north of the south line of sections 3 and 4, and thence nearly east across the S. W. $\frac{1}{4}$ of section 3, where it turned northeast and continued northeast across the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 3 to the northeast corner of appellants' north forty. In 1858 this road was resurveyed by one Coryell; and there is no question made but that it was an established county road. In 1860 one S. Farley and others petitioned for a change in this road, "commencing where said road crosses the section line between sections 9 and 10, in township 74, range 9 W.; thence north on said line to the foot of the bluff, and thence east until it strikes the section line between sections 2 and 3; thence north on said line to a point where said road crosses said section line." The statutory requirements

relative to the change of roads were strictly followed, and the commissioner appointed for the purpose filed his report plat and field notes in May, 1860. In July of the same year, the county court established the change as shown by the plat and field notes, which were ordered entered on the road records of Washington county. It does not appear, however, that the plat and field notes were ever, in fact, entered on the road records; but the record in this case discloses that they are now lost, and are not in the office of the county auditor.

After this change of the road was made, the road running in a northeasterly direction across section 3 was abandoned, and the public used the new road, and has continued to use it for fifty years. It has been worked and improved by the public authorities, and has, at all times, been recognized by every one, all of the parties to this litigation included, as a regularly established highway. The road north and south of the section line between sections 2 and 3 extends south only to a point where the road in controversy turns to the west, and the controversy in this case relates only to that part of the road that crosses the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 3; and, indeed, since Mayer has not appealed, the controversy is really confined to that part of the road crossing the southeast forty of the section. The record shows that the traveled road across this eighty is now substantially where it has been ever since its location in 1860. For more than twenty-five years, it has been fenced on the north side thereof across the Churchill land; and for that length of time, or longer, the Churchills have recognized it as a road by maintaining gates for the use of the public, which gates were kept open continuously, except during the stock-pasturing season each year. A great many years ago, Mayer undertook to change the course of the road across his forty and to throw it to the section line on the south thereof; but Joseph Churchill, the appellants' father, objected to such action,

on the ground that the road had been regularly established where it then was, and should not be changed, and thereupon Mayer abandoned his project. In 1876 the board of supervisors of the county recognized this road, and ordered a resurvey thereof for the purpose of more definitely describing it. One Sargent did the work, and varied the line of road, on paper, from its traveled course; but no one paid any attention to this change, and, as a matter of fact, the road, as changed by Sargent, was never opened or traveled, except at its two ends, where it met the used way. The board did not authorize Sargent to change the road as it was then traveled, but directed him to "resurvey and plat the same."

Another circumstance throwing light on the understanding of all parties in interest, and on the place where the road was, in fact, located in 1860, is found in the fact that some ten or fifteen years ago the elder Churchill and the board of supervisors had some negotiations, whereby the county was to obtain land of Churchill for the purpose of varying the established road near the east line of section 3, so as to avoid the stone hill that the north and south road then traversed.

In our judgment, there are several reasons why the decree of the trial court must be sustained. In the first place, we think the record conclusively shows the establishment of the road, substantially where it is now traveled, in 1860. That a road was established somewhere across this land at that time is unquestioned; and we think it should be presumed, and, in the absence of a showing to the contrary, found that the road was traveled and worked by the public authorities substantially where it was located by such survey. But if this road had not been regularly established and located in 1860, there can be no serious question but that the public long ago acquired the right thereto by prescription. A road had been legally established across this land, and in using the way actually traveled,

and in working and improving the same, the authorities and the public were undoubtedly acting under a claim of a right to such use. And such being the case the right of the public is complete, because the additional elements necessary to establish a road by prescription are present, as we have already pointed out. The facts, in our opinion, also show a dedication of the way traveled and an acceptance thereof, under the rules announced in *Fountain v. Keen*, 116 Iowa, 406; *State v. Tucker*, 36 Iowa, 487.

The width of this road, as established, was fifty feet. Churchill recognized this width by claiming and receiving
 2. SAME: an exemption from taxation of the amount
 estoppel. of land so taken and used, and his heirs
 can not now question the matter. The judgment is—
Affirmed.

THE FIRST NATIONAL BANK OF OTTUMWA, IOWA, Appellee,
 v. P. L. FULTON, Appellant.

Corporations: STOCK: CONSIDERATION OTHER THAN MONEY. The note
 1 of a solvent maker given for corporate stock thereafter to be
 issued is not void, because in violation of the statute providing
 that when it is proposed to pay for capital stock in property or
 other thing than money, the Executive Council shall ascertain
 the value thereof, especially at the instance of the maker. The
 purpose of the statute is to protect the corporation against the
 issuance of stock for property, services or other thing of ficti-
 tious value, rather than for the benefit of the purchaser.

Same: FAILURE OF CONSIDERATION: EVIDENCE. Proof of partial fail-
 2 ure of consideration will not support a plea of total failure.
 In this action upon a promissory note the evidence does not
 establish total failure of consideration.

Same: FALSE REPRESENTATIONS. Representations concerning the value
 3 of corporate stock which relate to no existing facts, but are
 mere expressions of opinion as to its future value, do not of
 themselves amount to false representations, such as will avoid
 a note given for the purchase price of the stock.

Negotiable instruments: HOLDER IN DUE COURSE. The question of

4 whether the purchaser of a note is one in due course is immaterial where the maker has no valid defense to a suit thereon.

Appeal: AMENDMENT OF RECORD. When the record of a case has
5 once been made in the district court by the filing and certification of the shorthand notes and transcript, it is not subject to amendment by the reporter alone; this can only be done upon application, notice and order of court.

Trial: REOPENING CAUSE: DISCRETION. The propriety of reopening
6 a cause for further evidence after the parties have rested is largely a matter of discretion, and in the absence of its abuse the order of the trial court will not be disturbed.

Same: DIRECTION OF VERDICT: TIME OF RULING: DISCRETION. It was
7 within the discretion of the trial court to withhold a ruling on a motion to direct a verdict for plaintiff, upon reopening the cause for further evidence, until the close of all the evidence; and where upon the whole evidence the defendant was not entitled to judgment in any event, any informality in ruling upon the motion was not prejudicial.

Appeal from Wapello District Court.—Hon. F. M. HUNTER, Judge.

TUESDAY, OCTOBER 22, 1912.

ACTION at law upon a promissory note. The payee of the note was T. H. Corrick, who transferred the same in due form to the plaintiff. The defendant set up the following defenses: (1) That the note was void because issued in violation of the provisions of section 1641-b, Code Supplement; (2) that it was void for want of consideration and because the consideration had failed; (3) that it was obtained by false and fraudulent representation. It was also averred that the plaintiff was not a holder in due course. At the close of the evidence the trial court directed a verdict for the plaintiff. The defendant appeals.
—*Affirmed.*

J. P. Starr, for appellant.

J. J. Smith, for appellee.

EVANS, J.—The note in question bears date March 8, 1908, and is for \$500. It is known in this record as Exhibit A. Another note for a like amount was executed by the defendant to the same payee at the same time, which is known in the record as Exhibit 1. These notes were executed in purported payment for ten shares of corporate stock to be issued in the corporation known as the Underwriters' Agency Company. This company was a going concern, which had been originally capitalized at \$15,000. The defendant had become a stockholder therein about a year prior to the transaction considered herein. Previous to March 28, 1908, the defendant had become the owner of two blocks of stock of five shares each issued upon the original capitalization. Shortly before March 28, 1908, it had been voted to increase the capitalization to \$25,000, and thereby to issue and sell \$10,000 additional stock. It was a part of this issue for which the defendant bargained at the time of the execution of the note in suit. The purpose of the corporation was to conduct a life insurance agency, and for that purpose it took over the business already existing of T. H. Corrick. Leading business men of tried sagacity looked upon it with favor, and became stockholders therein. Corrick was its secretary and treasurer and general manager. It paid enticing dividends at ten percent, and won the affections of its stockholders, and then died. We have only to do herein with the transactions relating to the notes of March 28, 1908, one of which is in suit herein, although the evidence in the record takes a somewhat wider range. We will direct our attention to the particular defenses set up in the order above stated.

I. Section 1641-b of the Code Supplement is as follows:

Capital stock—how issued—executive council to fix value. That from and after the passage of this act no corpo-

ration organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in chapter thirteen, title 9 of the Code shall issue any capital stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for the capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council.

The transaction was had between Corrick and the defendant. The consideration for the note was an agreement to issue and deliver stock at par value in the corporation, and a certain further agreement on the part of Corrick personally which will be referred to later.

Was the note void as in violation of section 1641-b, *supra*? We think not. The clear purpose of such section of the statute is to protect the corporation as such against the issue of its corporate stock in payment for property or services or other thing at fictitious valuations. "If it is proposed to pay for said capital stock in property or in any other thing than money," it is made the duty of the executive council to "ascertain the real value of the property or any other thing which the corporation is to receive for the stock." Granting that the spirit and letter of this statute might be

1. CORPORATIONS:
stock consid-
eration other
than money.

violated by issuing stock for promissory notes, no such case is presented here. Nor in any event do we think the statute could be made available as a weapon in favor of the makers of notes, except for fraud or for want of consideration. These grounds we consider later. In the case before us, the maker was solvent, and the note was good. It was in itself a proposal and a promise to pay in money. There was no occasion for its valuation. It was executed and delivered before the delivery or issue of the stock. The statute therefore had not been violated at the time of the delivery of the note. The statute only forbids the issuance of the stock "until the corporation has received the par value thereof." The statute does not forbid the execution of a promise to pay the par value of the stock in advance of the issuance thereof. It can not be said therefore that the note was void as having been executed in violation of this statute.

II. It is next argued that the note was without consideration, and that the consideration thereof wholly failed. As already stated, the substantial consideration for the note

was the promise to issue stock. There was
2. SAME: failure of consideration: evidence. a further consideration that Corrick executed and delivered to the defendant a written agreement. This was not produced at the trial, but its substance was shown to the extent that he agreed to purchase such stock from the defendant at the expiration of one year and to pay him therefor par, and a premium of \$50. For some reason not appearing in the record, the certificates were never in fact issued. Defendant was treated, however, as the owner thereof, and some dividends were paid to him thereon. In September, 1908, the defendant elected to require Corrick to purchase such stock. Thereupon, in September, they entered into a written agreement known in the record as Exhibit C. Such agreement, so far as it relates to the note in suit and its sister note, Exhibit 1, is as follows:

Agreement between T. H. Corrick and P. L. Fulton as follows: Corrick agrees to sell one thousand dollars (\$1,000.00) of stock in Iowa Underwriters' Agency Co., owned by Fulton within thirty days from this date at par and will take up and deliver to Fulton two notes of five hundred dollars (\$500.00) each, dated March —, 1908, payable to Corrick. Fulton to have dividends at 10 percent per annum on stock from July 1, 1908, to date of sale and to pay interest on the notes according to the terms thereof. . . . In the event that Corrick fails to sell said stock, he agrees to buy same and pay for same on above terms and conditions. (Signed) P. L. Fulton. T. H. Corrick.

Before this contract was entered into and on June 16, 1908, the present plaintiff had become the owner of the note in suit, claiming to have purchased the same in due course. In pursuance of the contract, Corrick surrendered to the defendant the \$500 note (Exhibit 1), and paid him \$500 in cash, which is the face of the note in suit. He also paid purported dividends on the stock at 10 percent. The note in suit bears interest at 7 percent. Defendant's testimony in reference to this transaction is set forth in his own abstract as follows:

After this agreement was made Corrick paid me \$500 in cash, and took up and sent to me one of my notes for \$500, and afterwards when the settlement in March, 1910, was made, he paid to me and my brother \$1,000 in cash and gave us a note signed by himself and wife for \$1,228. The note which my brother had given Mr. Corrick was for \$500. To make the matter clear I gave him the first note about the last of April, 1907, the second note on January 27, 1908, and two notes on March 28, 1908. For the first two notes, I received two certificates of stock for \$500 each, and at the time of the contract in September, 1908, he gave me his personal check for the dividends that was supposed to be standing on the books in my name which I had not received, and this was on the dividends due me on the entire \$2,000 investment up to July 1, 1908. After that contract he sent me \$500 in cash

and returned one of the second \$500 notes. I still held two certificates of stock which I had received and continued to get dividends on that stock until the final settlement in March, 1909, except about \$25 in dividends which I had not received, but which went into the final settlement. The \$1,000 paid in the final settlement as shown by 'Exhibit 4' was also to cancel the indebtedness from Corrick to my brother, W. A. Fulton, on a note for \$500 which he had given for stock that he had never received. When I and my attorney were here to see Corrick in September, 1908, about the stock certificates which I had not received, Corrick represented that the new stock certificates had not yet been issued, but that it was on the books all right, and I would get it in a few days. The question of dividends came up because I had not received the dividends on the stock which I held, and he said it had been overlooked by the bookkeeper, and he would give me his personal check, which he did, for some \$48 or \$50. He drew the check to himself and endorsed it.

This testimony is set forth a little more fully in the amended abstract of appellee. The foregoing, however, is sufficient to make it appear that the defendant received back from Corrick the full equivalent of the note in suit less the accrued interest at 7 percent for six months, or, as he estimates it, \$25 in dividends. Upon this showing the agreement entered into by Corrick both at the time the note was given and also in September was breached to the extent of \$18 to \$28. Such a breach is not available to the defendant as a defense of total want of consideration. Whether the defendant could have interposed a counterclaim to this extent and substantiated the same as against the plaintiff we need not determine. The only defense pleaded at this point is the defense of total failure of consideration. His own testimony is fatal to such defense, and the court properly withdrew it.

III. The third defense above stated was not interposed until after the close of the evidence, and on the last day of the trial. The allegations of false representations

are as follows: The payee (nominally) T. H. Corrick represented to defendant that the Iowa Underwriters' Agency Company was a prosperous company, and able to pay a 10 percent dividend per year, and would be able to pay 20 or 30 percent before the note matured; that, if defendant would execute the two notes for stock in the Iowa Underwriters' Agency Company, he, Corrick, would personally guarantee a premium of \$50 on the stock at the end of the first year if defendant wanted to sell it and a premium of \$57 on the stock at the end of eighteen months if defendant then wanted to sell, and that he, Corrick, was financially worth \$10,000, and amply able to make said guaranty good; that the company would hold said notes in their vaults and not negotiate them, and would surrender them to defendant at their maturity if defendant desired to surrender his stock at that time, because the company did not need the money; and that W. B. Bonnifield was a director in said company.

The defendant's testimony in support of these allegations is as follows: "When I bought this last stock, Corrick told me that he would keep those notes right in the safe of the Iowa Underwriters' Agency Company. I believed his statements that he would do so, and that he would return the notes and pay the premiums as he said he would, and he told me that I would not want to sell him the stock back because I would want to keep it as it would pay at least 20 percent by that time. I did not have any reason to think that he was not making me a truthful proposition, and I believed what he told me at the time." Some other representations are claimed to have been made at a previous purchase of stock. It will be noted that the representations above quoted from the defendant's testimony relate to no existing fact. Standing alone, these are mere promises or expressions of opinion for the future. Such promises may sometimes form a part of known false representations, but there is no attempt in this record to give

them any other character than appears upon their face. They do not of themselves amount to false representations in a legal sense. We must hold, therefore, that this defense was not sufficiently supported to require its submission to the jury.

Considerable argument is devoted to the question whether the plaintiff was a holder in due course. In view of our conclusions above indicated, the question becomes immaterial. It was a purchaser of the
 4. NEGOTIABLE IN-STRUMENTS:
 holder in due course. notes. The question of notice would become material only in the presence of a valid defense by the defendant as against this note. The evidence discloses that the real grievance of the defendant is in relation to other transactions.

These can not be litigated here, nor has any attempt been made by the pleadings to bring them into the litigation. We must therefore ignore them.

IV. Appellee has moved to dismiss the appeal for failure of appellant to serve notice of appeal upon guarantor defendants against whom judgment was entered. Considerable argument is devoted to this motion. It is sufficient to say that the same motion was submitted in advance of the submission of the case. It was then overruled and the ruling announced. We have seen no reason for a change of view and the former ruling will be adhered to.

V. Appellant has moved to strike a purported amendment to the transcript and an amended abstract by appellee. The appellee claims that through oversight the original transcript filed in the district court failed to incorporate a statement appearing in the original notes to the effect that at the close of all the evidence the plaintiff moved for a directed verdict. After the filing of appellant's abstract here, the shorthand reporter of the trial court filed with the clerk of such court an amendment to his transcript setting forth the additional record and certifying that it

was omitted by oversight from the original transcript. The amended transcript has been certified to this court, and an amended abstract incorporating the same has been filed by appellee.

It is sufficient to say that, when the record has been once made in the district court by the filing and certification of shorthand notes and transcript, it is not subject to change by the mere act of the shorthand reporter. The proper method of correction is very simple, and can not be ignored. Only the court has power to correct the record. For such purpose an application should be made to the court, and proper notice given. The trial court can then determine upon the evidence whether the record contains any mistake or oversight which is subject to correction, and can order or refuse correction accordingly. In the case before us no such proceeding was had. The appellant's motion to strike must therefore be sustained.

VI. Some specific errors in relation to the admission of testimony are urged by the appellant: If these specifications were sustained, they would avail nothing to the defendant. The rulings were wholly without prejudice in view of our conclusions already announced, and we will not undertake to pass upon them as abstract propositions.

It is also urged by appellant that the trial court abused its discretion in reopening the case for additional evidence after the parties had once rested. This practice is not unusual. The record at this point discloses no abuse of discretion. The propriety of such an order is pre-eminently within the discretion of the trial court. *Meadows v. Hawkeye Insurance Co.*, 67 Iowa, 57.

Lastly it is argued that the plaintiff did not move for a directed verdict at the close of all the evidence. This is the point in the record which was attempted to be covered by the amended transcript. Our ruling on appellant's

5. APPEAL:
amendment
of record.

6. TRIAL: re-
opening cause:
discretion.

motion to strike leaves the record in the condition contended for by appellant. From such record it appears that at the close of the evidence, when the parties first rested, the plaintiff presented a motion for a directed verdict. Before this motion was ruled on, the case was reopened at plaintiff's request for further evidence and further evidence was received, and the parties again rested. Thereupon, according to the record, the court sustained the plaintiff's motion for a directed verdict. Whether this motion was written or oral does not appear. Whether the ruling had reference to the motion previously made or to the renewal thereof, made after the final resting of the parties, does not appear. To our minds it is quite immaterial.

That the trial court should withhold ruling upon the motion to direct a verdict upon a reopening of the evidence and should then rule thereon at the close of all the evidence was a matter of mere form and order, and was clearly within the discretion of the court.

Moreover in view of our finding that the defenses of the defendant had all failed under the testimony, a judgment against him was inevitable, and the formality of the procedure at this point could not be prejudicial to him.

The judgment below must be—*Affirmed.*

J. C. McCONKEY, Appellant, v. EDMUND PENDLETON,
Executor of the Estate of HENRY RIDING, deceased,
Appellee.

Reference of causes: APPOINTMENT AND QUALIFICATION OF REFEREE:

- 1 STATUTES. The provisions of the statutes relating to the appointment, acceptance and qualification of a referee appointed by the court to try and report a cause are directory only, and do not go to his power to act as referee. And the error of failing to sign his report may be cured by afterward affixing his signature and refileing the report.

Same: TIME FOR FILING REPORT. The general rule is that a referee
2 should file his report at the next succeeding term, in the absence
of an order of court fixing the time for filing the same; but the
time may be extended by agreement: Thus where the court in
the order of appointment fixed no time for the referee to re-
port, and the parties stipulated that he should make and file his
report as of the last day of a certain term, and that the same
should be submitted in vacation if the court was not in session
and decree entered as of that term, he was authorized to file
his report at any time during that term and until the commence-
ment of the succeeding term; but upon his failure to so file
the report he lost jurisdiction of the case.

Same: WAIVER OF FAILURE TO FILE REPORT: ESTOPPEL. Exceptions to
3 the first report of a referee and motions to set it aside, filed
a short time before moving to strike out the report, were not
a waiver of the referee's failure to file a second report within
the proper time, where the motion to strike was made as soon
as counsel learned of the filing of the second report.

Same. Ordinarily there can be no estoppel to assert that a referee's
4 report was not filed in time.

Appeal from Woodbury District Court.—HON. WM. HUTCHINSON, Judge.

TUESDAY, OCTOBER 22, 1912.

THIS is an appeal from a ruling of the trial court overruling plaintiff's objections and exceptions to, and motion to strike the report of a referee, and from a finding approving the report and ordering judgment for the plaintiff in the sum of \$260.55.—*Reversed and remanded.*

Edwin J. Stason, for appellant.

Pendleton & Wakefield, for appellee.

DEEMER, J.—The original action was brought by plaintiff against Henry Riding, now deceased, asking for an accounting. Defendant pleaded settlements, and denied any indebtedness to the plaintiff. After the issues were

made up and on December 13, 1909, one C. C. Hamilton was appointed referee to report his findings of fact and conclusions of law. The case went to a hearing before the referee, and on June 31, 1910, it was stipulated that the case should be submitted on briefs, arguments, etc., on July 11, 1910, and that he should make his report on the last day of May, 1910, term of court. On July 1st it was further stipulated that the case might be submitted to the court in vacation and judgment entered as of the last day of the May, 1910 term. On December 8, 1910, what purported to be a report of the referee was filed, but this was unsigned. In this report was the following recommendation: "I find that plaintiff is entitled to recover from the defendant the sum of \$230.55." On December 13, 1910, objections were filed to this report by the plaintiff because the referee failed to find any conclusions of law, and failed to certify and return the evidence before him. On the 14th of the same month plaintiff moved to strike the report because (1) the referee was not called upon to accept the appointment and the record shows no acceptance; (2) because he did not make the affidavit required by section 3745 of the Code, and no affidavit was ever filed with the clerk; (3) the report was filed too late and after the authority of the referee had terminated; (4) no time was fixed by the court for the report; (5) the report was not made in time; (6) the report was insufficient and inaccurate. On January 12, 1911, the referee filed another report identical with the first, accompanied by this statement:

I was not present in the courtroom when the appointment was made, but soon afterwards, and on the same day Judge Hutchinson notified me that the parties had consented to my appointment. I informed him that I would accept the appointment and act as referee. I conferred with the attorneys and with the plaintiff with reference to the time for taking testimony, and by agreement the first testimony was taken on behalf of the plaintiff December

28, 1909. Adjournments were taken from time to time, and the testimony was concluded on April 10, 1910. Shortly, thereafter, I left Sioux City, and was gone till May 20, 1910. I furnished a transcript of the testimony to the parties about June 30, 1910. Thereafter the attorneys filed their briefs, and 'I made a finding of fact and filed the same with the clerk . . . on the 8th day of December, 1910, as shown by the filing marks on the report. Through inadvertance I failed to sign the said report although a blank space was left therefor. . . . I furnished to the plaintiff and to the attorneys for the defendant a copy of said report. On this date, January 12, 1911, at the request of the attorneys for the defendant, I have signed and filed said report. I have also this day, filed the transcript of the evidence, and also the shorthand notes of the evidence taken therein. I further depose, and say that, before taking any of the testimony in said cause, Mr. E. J. Stason, attorney for plaintiff, asked me if I had filed my affidavit as referee, and I told him I had not. Thereupon Mr. Stason administered to me the oath of referee, said E. J. Stason being a notary public.'

As soon as plaintiff's counsel learned of this, he filed a motion to strike the report and the accompanying affidavit. On January 5, 1911, Riding died, and no substitution was made until April 14, 1911. The case on these motions was submitted on April 14, 1911, and on May 20th the trial court made an order overruling each and all of plaintiff's motions, and all exceptions were also overruled, and judgment was entered against the administrator of Riding's estate for the sum of \$260.55, being \$30 more than the amount recommended by the referee. Plaintiff appeals from all these orders and from the judgment.

The relevant sections of the Code bearing upon this appeal are as follows: "The referee shall stand in the place of the court, and shall have the same power so far as necessary to discharge his duty." Code, section 3738. "The report of the referee on the whole issue must state the facts thus found and the conclusions of law separately, and

shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; the report may be excepted to and reviewed in like manner." Code, section 3740. "When the reference is to report the facts, the report shall have the effect of a special verdict." Code, section 3741. "The referee must make affidavit well and faithfully to hear and examine the case, and make a just and true report therein, according to the best of his understanding. The affidavit shall be returned with the report, filed by the clerk, and be a part of the record." Code, section 3745. "The order shall not be made until the case is at issue as to the parties whose rights are to be examined on the reference. The order may direct when the referee shall proceed to a hearing, and when he shall make his report, but, in the absence of such direction, he shall do so on the morning of the tenth day after the day on which the order or reference was made, and shall file his report as soon as done. The parties shall take notice of the time thus fixed or determined and non-attendance of either party within an hour thereof shall be attended with like consequences as if the case were in court, which consequences shall be reported as any other fact or finding of the referee." Code, section 3746. "The referee must be called on by the court to accept or refuse the appointment, and his acceptance shall be entered of record: and he shall be under the control of the court, who may on the motion of either party make proper orders with a view to his proceeding with all due dispatch, and the court or judge may, on motion extend the time for making his report." Code, section 3747.

The main points for a reversal are: (1) The referee was not called upon to accept the appointment, and his appointment was not entered of record. (2) The referee made no affidavit, and no affidavit by him was ever filed with the clerk. (3) The report of the referee was not signed by him. (4) The referee did not report his findings of

fact and conclusions of law separately. (5) The referee had no jurisdiction to act and the report filed in January of the year 1911 was too late.

The record shows that the referee did accept the appointment, and, although his acceptance was not entered of record at the time it was given, it was recognized in a stipulation filed by the parties and an order of court made July 1, 1910. An oath was in fact administered to the referee, although it seems no affidavit was ever filed by him in the district court.

1. REFERENCE OF
CAUSES: ap-
pointment and
qualification of
referee:
statutes.

The first report was not signed by the referee, but this was cured by adding his signature and the refileing of the same after the signature had been appended.

The provisions of the statute applicable to these omissions may well be regarded as directory only, and not as going to the power or authority of the referee to act. Indeed, such seem to be the prior holdings of this court in *Harper v. Kissick*, 52 Iowa, 733; *Quick v. Cox*, 38 Iowa, 568; *Shindler v. Luke*, 43 Iowa, 89; *Sears v. Sellev*, 28 Iowa, 501. The report should not be regarded as filed, however, until it was signed by the referee and refiled on January 12, 1911. This brings us to the only debatable proposition in the case. Was the report filed in time, and should the referee be held to have lost jurisdiction of the case?

The order appointing the referee did not fix the time for hearing, nor did it give any direction as to when the report should be made, but the parties made the following

2. SAME: time
for filing
report.

stipulation with reference thereto: "It is further stipulated that all briefs, arguments, evidence, and exhibits shall on the last-mentioned date be submitted to C. C. Hamilton, referee, and that he shall make and file his report as of the last day of May, 1910, term of this court; that the parties to the cause shall have five days after the date of the actual

filing of the report in which to file objections thereto and briefs and arguments, and that the report of the referee, the objections thereto, and all the briefs and arguments shall be submitted to the Hon. Wm. Hutchinson for determination of the cause in vacation, if the court be not in session, and by him determined, and, if determined by him in vacation, decree may be entered as of the May, 1910, term of this court." And on July 1, 1910, the court made and entered the following order in the case: "And now at this time, to wit, July 1, 1910, come the parties herein by their respective attorneys of record, and in open court stipulate and agree that this cause may be submitted to the court in vacation and judgment entered in vacation as of the last day of May, 1910, term of this court."

The report was not in fact filed as we think until January 12, 1911; and it is conceded that between the time of the appointment of the referee in December, 1909, and the filing of the report at least four terms of court intervened.

The last of the testimony was taken in April, 1910, and by stipulation the parties were given until the 11th of July, 1910, in which to file their arguments. This excuses any failure of the referee to act before that date. After the submission and before the actual filing of the report at least one term intervened. Now, the stipulation says that "the referee shall make and file his report as of the last day of the May term of court; that the parties shall have five days after the actual filing of the report to file motions," etc., and that the report should be submitted to Judge Hutchinson in vacation if court be not in session and decree entered as on the last day of the May, 1910, term of court. The order made and entered of record by the trial court confirms the stipulation as to the submission in vacation. These are the only matters appearing of record with reference to the time of filing of the report. As the court fixed no time for the filing of the report, it is certain that

the referee had jurisdiction to make a report at any time during the May term of 1910, and doubtless at any time thereafter until the commencement of the next succeeding term; and, as no time was fixed in the original order, the parties might stipulate as to when the report should be made. If not made at the time so stipulated, the referee under our decisions lost jurisdiction of the matter. *Goodale v. Case*, 71 Iowa, 434; *Davis v. Caldwell*, 100 Iowa, 658; *Manning v. Nelson*, 107 Iowa, 34. These cases do not perhaps go to the extent of holding that stipulations of the parties are controlling in the absence of an order by the court; but that result logically follows, and is the holding of the courts of other states. *Davis v. Finney*, 37 Kan. 165 (14 Pac. 460); *Berry v. Sands*, 60 Me. 99.

In the absence of an order of court or stipulation of the parties, the general rule seems to be that the referee's report must be returned to and filed at the next term succeeding his appointment. *Minton v. Moore*, 4 Blackf. (Ind.) 315; *Jeffers v. Hazen*, 69 Vt. 456 (38 Atl. 86); *Southworth v. Bradford*, 5 Mass. 524; *Mott v. Anthony*, 5 Mass. 489. *Contra*, *Francisco v. Rowland*, 14 Mo. App. 600.

Whatever the rule here, it is apparent that plaintiff waived any default in filing occurring prior to the May, 1910, term, and doubtless a filing at any time before the commencement of the next succeeding term would have been in time under the stipulation filed. That the time may be extended by stipulation, see *Shore v. Bank*, 61 Kan. 246 (59 Pac. 263); *Powell v. Ford*, 4 Lea (Tenn.) 278. What, then, is the effect of the stipulation of the parties. It seems to us that by the use of the terms "as of the last day of the May, 1910, term" to be determined in vacation and decree entered as of the May, 1910, term of court, and judgment entered in vacation of the last day of the May, 1910 term of this "court," the parties meant that the report should be filed either during the May term or during

that period between the adjournment of the May term and the day of the beginning of the next succeeding term. Such is the interpretation put upon the word "vacation" as here used. *Warner v. Donahue*, 99 Mo. App. 37 (72 S. W. 492); *Brayman v. Whitcomb*, 134 Mass. 525; *Hadley v. Bernero*, 97 Mo. App. 314 (71 S. W. 451). Of course, it is sometimes given a broader meaning, and held to cover any time when the court is not actually in session; but such was not the intent of the parties in this case. To so hold would place no limitations upon the time for a report, save that it might be filed during any vacation, no matter how long after the submission to the referee and without reference to the number of intervening terms. When the term next succeeding the May, 1910, term began, the vacation referred to in the order of the court and the stipulation of the parties was at an end, and, as the report was not filed either during the May term or in the succeeding vacation, it was not in time, and should have been stricken under the rules of this court, unless it be found that plaintiff waived the delay or is estopped from asserting that the report was not timely.

There was no waiver or estoppel unless it should be held that, by filing exceptions to the report and motions to set it aside a few days before moving to strike it, such an estoppel should be found. These exceptions and motions were lodged against the first report filed, which we have already held insufficient. As soon as plaintiff's counsel learned of the filing of the second one with the affidavit of the referee, they moved to strike this second one for the reasons already stated. We find nothing in this which should be held to be a waiver or considered an estoppel even if an estoppel could arise from conduct in such cases.

3. SAME:
waiver of
failure to file
report:
estoppel.

Aside from this, we have held that, if the referee's report is not filed in time, there can be no estoppel. *Davis v. Caldwell*, 100 Iowa, 658; *Goodale v. Case*, 71 Iowa, 434.

4. SAME.

The trial court should have sustained the motion to strike and made an order resubmitting the case, or appointing another referee or held the case for decision on the merits. As he did not do so, but proceeded to confirm the report with a slight modification, its actions in the premises were wrong, and the case must be reversed for proceedings in harmony with this opinion. The motion to strike appellee's abstract will be overruled.—*Reversed and remanded.*

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ACCOUNT.

Account stated: Evidence. The statement of an account for services rendered, which is accepted by the other party, constitutes an account stated, and no further proof of the items therein is necessary. The evidence in this case is held insufficient to establish the bill for professional services as an account stated. *Ida County Savings Bank v. Johnson*, 234.

ACCRETIONS. See REAL PROPERTY.

ACTIONS.

Dismissal. The appointment of a receiver for one of the parties after the commencement of an action is not ground for its dismissal. *O'Mara v. Newton & N. W. Ry. Co.*, 701.

Same. Where a cause had been continued by agreement of parties to accommodate one of the attorneys, a dismissal of the same by the court on its own motion, without having previously made any order that it should be brought to trial or it would be dismissed, and no trial notice having been filed, was improperly entered. *Idem*.

Certiorari: Abstract: Return: Amendment. It is permissible in *certiorari* proceedings to review the action of a town council in extending the limits of the town for defendant to amend the abstract curing an alleged defective description of the territory, and to amend its return by striking out that part showing that the polls were not opened until after the proper hour. *Lehigh Sewer Pipe & Tile Co. v. Town of Lehigh*, 386.

Same: Review of ministerial acts. *Certiorari* will not lie to review a ministerial act; such as the receiving or rejection of votes by the judges at a municipal election on the question of extending the town limits. *Idem*.

Same: Defective ballot: Review. *Certiorari* will lie to review the action of an inferior tribunal only when it has acted in a

ACTIONS Continued

judicial or semi-judicial character, and then only when the act was without jurisdiction or otherwise illegal; it is not the proper remedy for the correction of mere errors, nor of ministerial, administrative or legislative acts; nor to control the discretion of a judicial or semi-judicial body: Thus where the proper officials, in preparing the ballot used at an election on the question of extending the limits of an incorporated town, a purely ministerial act, omitted therefrom a description of the territory to be added, which constituted the only error complained of, and it in no manner prejudiced any elector, *certiorari* was not available for the purpose of vitiating the whole proceeding; but there was an adequate remedy either by injunction or *quo warranto*. *Idem*.

Mandamus: Transfer to equity: Statutes. The provisions of the statute relating to transfer of causes without abatement or dismissal, when an error in the kind of proceeding has been adopted, are not applicable to an action in *mandamus*; and if designated in the petition as a law action that fact would not require the defendant to move for a transfer to the equity side of the docket, and to object to a jury trial before answering, for the court has no authority to submit the action in any form to a jury. *Klopp v. Chicago M. & St. Paul Ry.*, 466.

Same: Reversal. Where an action in *mandamus* has been erroneously tried to a jury it will be reversed that it may be tried to the court as provided by statute. *Idem*.

Reference of causes: Appointment and qualification of referee: Statutes. The provisions of the statutes relating to the appointment, acceptance and qualification of a referee appointed by the court to try and report a cause are directory only, and do not go to his power to act as referee. And the error of failing to sign his report may be cured by afterward affixing his signature and refileing the report. *McConkey v. Peddleton*, 744.

Same: Time for filing report. The general rule is that a referee should file his report at the next succeeding term, in the absence of an order of court fixing the time for filing the same; but the time may be extended by agreement: Thus where the court in the order of appointment fixed no time for the referee to report, and the parties stipulated that he should make and file his report as of the last day of a certain term, and that the same should be submitted in vacation, if the court was not in session, and decree entered as of that term, he was authorized to file his report at any time during that term and until the commence-

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TO

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ment of the succeeding term; but upon his failure to so file the report he lost jurisdiction of the case. *Idem.*

Same: Waiver of failure to file report: Estoppel. Exceptions to the first report of a referee and motions to set it aside, filed a short time before moving to strike out the report, were not a waiver of the referee's failure to file a second report within the proper time, where the motion to strike was made as soon as counsel learned of the filing of the second report. *Idem.*

Same. Ordinarily there can be no estoppel to assert that a referee's report was not filed in time. *Idem.*

Transfer of causes: Harmless error. Refusal to transfer an action demanding only a money judgment to the equity side of the docket was harmless error, where by a subsequent amendment to the petition an equitable cause of action was pleaded and equitable relief demanded. *Miller v. Hawkeye Dredging Co.*, 557.

AGENCY. See CARRIERS.

Brokers: Commissions: Procuring cause. A broker may be instrumental in effecting a sale of real estate and still not be the procuring cause so as to entitle him to a commission for finding a purchaser. *Kurtz v. Payne Invst. Co.*, 376.

Same: Acceptance of purchaser. Ordinarily the production of a person willing to make an exchange of properties is not the performance of a contract to find a purchaser; but where the owner has reserved the right to fix the terms of sale, and accepts other property in part payment, he can not object to the broker's commission on the ground that the purchaser did not pay all cash. *Idem.*

Same: Commission contract: Variance by parol. Where the written terms of an agency made no provision for the payment of commissions in case of an exchange of properties, but had relation only to cases where sales were made, an oral agreement for compensation in case of an exchange was not in conflict with the writing and therefore provable. *Idem.*

Same: Procuring a purchaser: Evidence. The provision in a broker's contract that no commission should be allowed him unless he brought a customer and a sale was closed at that time, did not require the sale to be made at the time the broker was first appointed, but was a limitation of the period in which negotiations then begun should be concluded. Evidence held to re-

AGENCY Continued

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quire submission of the questions of whether the broker presented a prospective purchaser and the negotiations then begun resulted in a sale. *Idem.*

Same: Ratification of agent's acts. Confirmation of a sale made by a broker at a price fixed by the owner's agent is a ratification of the agent's representations as to commissions to be paid the broker. *Idem.*

Same: Evidence: Res gestae. The statements of an agent of the owner in the sale of land as to the payment of commissions, not a part of the broker's negotiation of the sale, are not admissible as *res gestae* in an action for the commission. *Idem.*

Same: Scope of authority. From authority to appoint agents may be inferred authority to fix the terms of the appointment, including the matter of compensation. *Idem.*

Same: Recovery: Quantum meruit. Where the claims of a broker to commissions are based upon express contract fixing his commission, instructions authorizing recovery on *quantum meruit* are erroneous. *Idem.*

APPEAL. See DRAINAGE—JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS—PARTITION—SURETYSHIP.

Amendment of record. When the record of a case has once been made in the district court by the filing and certification of the shorthand notes and transcript, it is not subject to amendment by the reporter alone; this can only be done upon application, notice and order of court. *First National Bank v. Fulton*, 734.

Defective abstract: Amendment. An appeal will not be dismissed because the original abstract was not subscribed by appellant's counsel, or because the same was not certified, where counsel's name appeared on the opening page of the abstract and both omissions were cured by an amendment. *Sutcliffe v. Pence*, 643.

Remarks of court: Review. Remarks of the court urging upon the jury the desirability of agreeing upon a verdict, to which no exception was taken at the time, are not reviewable on appeal. *Caldwell v. Iowa State Traveling Men's Assn.*, 327.

Reviewable question. The appellant court must determine a case on the record as presented; it will not express an opinion as to whether omitted facts would lead to a different conclusion. *Herr v. Green*, 532.

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Law of the case. A determination by the appellate court on a former appeal that the evidence was sufficient to take the case to the jury on all the issues raised became the law of the case, whether right or wrong. *White v. International Text Book Co.*, 210.

ARGUMENT. See NEW TRIAL.

ASSIGNMENTS.

Assignment of wages: Validity. A contract by which an employee, for the purpose of obtaining credit, gives the master authority to deduct from his wages an amount sufficient to pay his living expenses is not void as a unilateral contract, or as a mere license or privilege without consideration; since thereby the employee was enabled to procure credit and thus secure his employment. *Steltzer v. Chicago M. & St. Paul Ry. Co.*, 1.

Same: Rights of assignee. The assignee of the wages of a railway employee acquires no greater right thereto than the assignor had at the time of the assignment. *Idem.*

ATTACHMENT.

Garnishment: Notice to garnishee. A judgment against a garnishee who had no notice of the garnishment is invalid. *Reed v. Racine Boat Co.*, 12.

Garnishment: Service of notice. Where the statute of a foreign state provided that notice of garnishment in justice court should be served in such manner as the justice directed, and he ordered service of notice by mail on the claimant of the fund, service had in that manner was sufficient. *Steltzer v. Chicago M. & St. Paul Ry. Co.*, 1.

Same: Foreign judgments: Conclusiveness. Where a debtor has been regularly garnished in a foreign state the claimant of the fund by assignment, who had proper notice of the garnishment but failed to appear and protect his rights, can not maintain suit against that garnishee for the fund in the courts of this state. *Idem.*

ATTORNEYS. See PARTITION.

Authority of attorney: Ratification. An attorney has statutory authority to bind his client in respect to any proceeding within the scope of his proper duties and powers; but this does not authorize him, under a mere general employment to bring

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TO

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and prosecute an action, to enter into a stipulation of settlement of all matters involved in the suit and to dismiss the same, thus depriving his client of a just cause of action; this can only be done by special authority. And there could be no ratification of the attorney's act by the client without a knowledge of the terms and effect of the stipulation. *Lingenfelter Bros. v. Bowman*, 649.

Disbarment: Statutes: Constitutionality. The statute authorizing disbarment proceedings on the court's own motion, and the appointment of an attorney to draw up the accusation without the allowance of compensation, is not unconstitutional. *Brown v. Warren County*, 20.

Application of statute: Occupying claimant's action. The attorneys' lien law does not apply to actions under the occupying claimant's statutes; as there is no money due the adverse party, within the meaning of the lien law, which will support the lien. The claim in such cases may be satisfied either by the claimant paying the value of improvements and taking the property, or upon his refusal to pay he may permit the other party to take his interest in the property, or they may become tenants in common of the entire property, but the court has no power to render a personal judgment against the owner of the land or to order it sold to satisfy the claim, thus creating a fund to which the lien would attach. *McCormick v. Dumbarton Realty Co.*, 692.

BANKS AND BANKING.

Power of officers. Although the directors of a bank, under the authority of its articles of incorporation, employed the vice-president to supervise and conduct its business, still the president had the authority to dispose of land acquired by the bank; and his act in so doing in this instance was valid, especially as the managing officer knew of and acquiesced therein. *Ida County Savings Bank v. Johnson*, 234.

Same: Unauthorized acts: Burden of proof. A bank has the burden of proof in seeking to show that the acts of its officers were unauthorized. *Idem.*

Same: Evidence. Authority of a bank official to act for it, or the ratification of his unauthorized act, need not be a matter of record on the books of the bank; it is a question of fact which may be otherwise shown. *Idem.*

Negotiable instruments: Good faith purchase: Gambling con-

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tracts. A certificate of bank deposit is a negotiable instrument by which the issuing bank obligates itself to pay to the rightful holder the sum named in the certificate; and one acquiring the certificate under a blank indorsement in due course of business for value, before maturity and without notice, is a *bona fide* holder, under the Negotiable Instruments Act. *Kushner v. Abbott*, 598.

BOUNDARIES. See REAL PROPERTY.

BRIDGES. See HIGHWAYS.

BROKERS. See AGENCY.

BURGLARY. See CRIMINAL LAW.

CARRIERS. See RAILROADS.

Carriers of passengers: Disorderly conduct: Negligence: Evidence. It is the duty of a railway company to exercise care for the safety of its passengers; and where an intoxicated person enters a train and his presence is known to the trainmen it becomes their duty to prevent such person from assaulting and injuring another passenger. The evidence in this case is held to require submission of defendant's negligence, through failure of the trainmen to protect plaintiff from the assault of an intoxicated passenger, and to justify a finding of negligence in that regard. *Starr v. Chicago B. & Q. Ry. Co.*, 311.

Carriers of freight: Breach of contract: Tort: Pleadings: Proof. An action for injury to livestock while in transit may be based upon tort, or upon contract, and if purely a tort action is alleged the party is confined in his proof to that specific breach of duty; but if a contract for shipment and its breach are alleged, even though enough is stated in addition to justify recovery for violation of a specific duty, still he is not held to proof of the particular wrong but may show any breach of the contract for safe transportation; and proof that the stock was delivered to the carrier in good condition and that it was in bad condition when it reached its destination, not apparently due to unavoidable circumstances, will establish a *prima facie* case of breach of contract and authorize recovery, irrespective of the allegations of tort. *Gilbert Bros. v. Chicago, R. I. & Pac. Ry. Co.*, 440.

Livestock: Liability for injury: Rules of evidence. A carrier is liable for loss or injury to freight during its transportation,

CARRIERS Continued

not due to the act of God or the public enemy, its inherent nature or the act of the shipper, and as to these exceptions he may be liable for negligence; and whether the shipment be goods or livestock practically the same rules of evidence and of the burden of proof obtain. And where the loss is not due to the excepted cases, whether the action be for breach of contract for safe carriage, or for breach of a public duty to do the same thing, the carrier can not escape liability by proof of reasonable care. *Idem.*

Action for negligence: Proof. Proof that livestock was delivered to a carrier in good condition and that it was in bad condition when it reached its destination will support an action for its injury while in transit, based solely on allegations of negligence; and where such facts are alleged proof of the same makes a *prima facie* case of negligence, which is not obviated by a further allegation that at some particular point on the route defendant was guilty of some specific act of negligence; as the same was not essential to plaintiff's case, but was covered and included in the allegations and proof of good condition on receipt by the carrier and bad condition at destination. *Idem.*

Evidence: Market value. It is not reversible error to permit a qualified witness to state the difference in value of cattle in the condition in which they were delivered at destination and what their value would have been if delivered in good condition, as such difference in value is a mere matter of computation. *Idem.*

Same: Best evidence. Where the record of the weight of cattle was not admissible in evidence and there was no proof of its correctness, the testimony of a competent witness of the gain they had made from the date of purchase to the date of sale was admissible, over the objection that it was not the best evidence. *Idem.*

Authority of agents: Presumption: Proof of authority: Evidence. It will be presumed that a railway agent has no authority to act in the matter of making shipments from stations other than the one at which he is employed, and this is true with respect to his authority concerning shipments beyond the terminus of the road; but such authority may be shown by proof of other like acts of authority, or by the acceptance or approval of like services by his principal. The evidence in this case of the agent's authority to negotiate for shipment from another station is held sufficient to take the question to the jury, but not sufficient to show authority to make contracts of shipment be-

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yond the line of the company by which he was employed. *McManus v. Chicago Great Western Ry. Co.*, 359.

Declarations of agent. The declarations of an agent are not competent on the question of his authority to bind the carrier for shipments beyond its lines, unless his acts in so doing have been ratified or confirmed by carrying the same into effect. *Idem.*

Contracts: Variance by parol. Evidence that the shipping rates were not to be inserted in the contracts of shipment, and that no rates were in fact inserted when the contracts were signed, but that they were made out simply as evidence to the conductor of the right to transportation with the shipment, was not objectionable as tending to vary or contradict the terms of the instruments; but was admissible to show what the contracts in fact were when signed. *Idem.*

Delay in transportation: Evidence. In this action for delay in transportation the evidence is held to warrant a finding that defendant was responsible for a delay of several hours, between the point of shipment and the yards where the stock was unloaded for feed and rest. *Idem.*

Same. In an action for negligent delay in the shipment of stock, evidence of the length of time required to ship stock between two other points further separated than those in question, and on another line of road, was inadmissible, but in view of the record in this case its admission was not prejudicial. *Idem.*

Negligent delay in transportation: Measure of damages. Where a carrier contracts to transport stock to the terminus of its line, with the understanding that it is to be taken by other companies and transported in the same cars to its destination, the measure of damages for negligent delay by the initial carrier is the difference in the value of the stock in the condition in which it was in fact delivered, and its value had it been delivered within a reasonable time, at the point of destination. *Idem.*

Interstate commerce rates. Rates for the interstate transportation of freight, which as fixed by the carrier's agent are inconsistent with the schedules filed with the Interstate Commerce Commission, are invalid. *Idem.*

Connecting lines: Excessive charges: Recovery of same. Where the interstate charges on freight were paid by each succeeding carrier to its predecessor up to its own line, and the

CARRIERS Continued

terminal carrier collected all the freight from the shipper for the entire distance at its termination, and it was not shown that any part of an overcharge ever reached the initial carrier, the initial carrier was not liable for any part thereof. *Idem.*

Discrimination in rates: Limitations. Actions against common carriers for discrimination in rates are barred in two years, unless there has been a fraudulent concealment of the discrimination. *Central Trust Co. of Ill. v. Chicago, R. I. & Pac. Ry. Co.*, 104.

Interstate commerce: Discrimination in rates. Where hogs were purchased at different markets in the state and forwarded to one central point, there unloaded, sorted and most of them reloaded and shipped to foreign states, a finding that the first shipment was merely local and did not become interstate until the hogs were reloaded and accepted for shipment out of the state, was authorized; and the granting of an interstate rate from the initial point to their ultimate destination, lower than the local rate to the place of unloading and reshipment, and such hogs came into competition with those of other purchasers making only local shipments, would constitute an unjust discrimination against the local purchasers, within the meaning of the statute prohibiting a common carrier from giving preference to any particular person. *Idem.*

Same. Where hogs were purchased especially for shipment out of the state, although assembled at a central point within the state for the purpose of sorting, reloading and determining their ultimate destination, their shipment at an interstate rate was not a discrimination against local purchasers who were charged a local and higher rate of transportation; as the same did not come into competition with local shipments. *Idem.*

Limitations: Pleadings. The statute of limitations when relied upon as a defense must be specially pleaded; so that a general denial of a petition alleging that discriminations in freight rates against the plaintiff prior to the two year limitation period, were fraudulently concealed and did not come to the knowledge of the plaintiff until about the time of bringing suit, was not a sufficient pleading of the statute to raise the question of limitation. *Idem.*

Discrimination in rates: Damages: Who may recover. An action for damages because of alleged violation of the statutes prohibiting discrimination in freight rates is *ex delicto* and not *ex contractu*; so that a purchaser of live stock can not recover

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TO

CONTRACTS

such damages for the breach of a contract made by him for the benefit of another, but only such as he himself actually sustained. Thus where it appeared that plaintiff purchased hogs f. o. b. at his place of business, paid the freight and deducted the amount from the purchase price, presumptively at least the consignor and not the plaintiff suffered the damage from any discriminatory rates, and unless overcome by the evidence he is not entitled to recover. *Idem.*

CERTIORARI. See ACTIONS—ELECTIONS.

CHATTEL MORTGAGES.

Oral agreement: Garnishment. A chattel lien may be created by oral agreement, and where the agreement is followed by a change of possession the property is not subject to attachment. Thus where a debtor orally agreed with a creditor and a third person to sell certain property and place the proceeds in the hands of the third party for the benefit of the creditor a lien was created; and when the fund passed to the third party it was in effect delivered to the creditor and was not subject to garnishment, even though a portion of the fund was received by him after service of garnishment. *Bank of Hinton v. Swan*, 715.

Extinguishment of lien. Chattel mortgage liens are extinguished by a sale of the property by agreement of the parties, and the mortgagee's rights thereafter are to the proceeds according to the agreement. *Idem.*

COMPROMISE AND SETTLEMENT. See NEGOTIABLE INSTRUMENTS.

CONSPIRACY. See MALICIOUS PROSECUTION.

CONTEMPT. See INTOXICATING LIQUORS.

CONTRACTS. See CARRIERS—EQUITY—HUSBAND AND WIFE—INSURANCE—INSANITY—MUNICIPAL CORPORATIONS—REAL PROPERTY.

Construction: Evidence. Where the evidence is conflicting as to the terms of an oral agreement and the language of a lost writing on the subject, it is competent to show the interpretation put upon the agreement by the parties themselves, and to take into consideration their understanding of the terms and effect thereof, in determining the real agreement; and it is proper for the court to instruct in accordance with the terms of the statute, that the sense is to prevail against either party to an

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TO

CONVEYANCES

agreement in which he had reason to suppose the other party understood it. *Cedar Rapids National Bank v. Carlson*, 343.

Modification: Appeal: Review. Where the modification of a contract had been assented to and its provisions performed, absence of the signature of one of the parties was not material as bearing on its validity; and where the record on appeal failed to show the original paving contract, or whether payment was to be made in a lump sum or according to area, the propriety of a ruling sustaining a modification of the original contract could not be reviewed. *In re Appeal of Mayden*, 157.

Modification of contract by parol. The parties to a written contract may subsequently modify it by an oral agreement, or entirely supersede it by one in parol. *Kurtz v. Payne Invst. Co.*, 376.

Construction: When performed. A broker's contract providing that commissions should be due and payable on settlement of all sales is construed to mean upon full payment of that part of the price to be paid in cash, whether at the time of signing the contract of sale, or only part then and the balance at consummation of the contract; and commissions not thus matured at the time judgment was entered on the contract were subject to a plea in abatement. *Idem*.

CONVEYANCES. See FRAUD.

Construction: Words of inheritance. While under the statutes technical words of inheritance are not necessary to constitute an estate in fee, or to create an estate of inheritance, still they may be important in determining whether a fee is conveyed. *Husted v. Rollins*, 546.

Habendum clause. The objection of a *habendum* clause in a deed is to define the grantee's estate; and while at common law it was the general rule that it might be resorted to to explain, enlarge or qualify the estate but not to defeat it, the modern rule adopted in this state is to construe the whole instrument without reference to formal divisions, so as to effectuate if possible the grantor's intent. *Idem*.

Grantee named in habendum only. A grantee named for the first time in the *habendum* clause may acquire the remainder by a fee title, the grantees named in the preceding portion of the instrument taking only a life estate. *Idem*.

Consideration: Parol evidence. While a deed is the culmination

CONVEYANCES Continued

TO

CORPORATIONS

of the contract for the sale of land it rarely constitutes the full agreement; and although a grantor can not show a total want of consideration where one is expressed the nature and amount of the same may be inquired into. So that under a deed expressing a stated consideration, but excepting from the description the "railroad right of way," it was competent to show that in addition to the expressed consideration the grantor was to have whatever might be recovered for the right of way. *Sutcliffe v. Pence*, 643.

Conveyance subject to mortgage: Presumption. Where land is sold subject to a mortgage the land becomes the primary fund for payment of the indebtedness, and the incumbrance is presumed to have been provided for in adjusting the consideration. *Marshall Invst. Co. v. Lindley*, 6.

Mental capacity: Burden of proof. In seeking to set aside a deed on the ground of mental incapacity and undue influence the burden of establishing the incapacity is upon the plaintiff. In the instant case the evidence is held insufficient to show lack of mental capacity. *Clawson v. Webber*, 704.

Undue influence: Evidence. Neither the unreasonableness of a will or conveyance alone, nor mere love and affection between parent and child is sufficient to show undue influence; nor will a consideration for the welfare and comfort of either parent or child establish such influence, or raise a presumption that it was exercised; although in cases where the testator or grantor was old and infirm, and reposed great confidence in a child, a transaction for the benefit of the child will be closely scrutinized, and he will be required to show its good faith. The evidence is held insufficient to show undue influence. *Idem*.

Revocation: Substitution. The parties to an unrecorded deed may revoke the same and substitute another by parol agreement; and it is immaterial whether the original was destroyed or delivered back to the grantor. Evidence held to show that by agreement the former deed reserving a life estate was revoked and a new deed executed and delivered in its stead, reserving a fee title to the land, under which plaintiff in this action claims title. *Wardman v. Harper*, 453.

CORPORATIONS. See BANKS AND BANKING—INSURANCE—MUNICIPAL CORPORATIONS.

Payment for stock: Conversion: Rights of stockholders. A shareholder is not by virtue of that fact alone a corporate cred-

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TO

CRIMINAL LAW

itor, and he has no distinct right to any of the corporate property; but the corporation may become indebted to him the same as to a stranger: So that where the corporation refused to apply money tendered in payment of stock subscriptions to that purpose, but accepted and retained the same, converting it to its own use, its liability was the same as for the conversion of the property of a stranger. *Miller v. Hawkeye Dredging Co.*, 557.

Rights of stockholders: Injunction. Stockholders seeking to establish a lien on funds of the corporation are not entitled to a temporary injunction restraining the corporation from otherwise disbursing the fund, where there is no allegation of insolvency and they are only entitled to a money judgment. *Idem.*

Stock: Consideration other than money. The note of a solvent maker given for corporate stock thereafter to be issued is not void, because in violation of the statute providing that when it is proposed to pay for capital stock in property or other thing than money, the Executive Council shall ascertain the value thereof, especially at the instance of the maker. The purpose of the statute is to protect the corporation against the issuance of stock for property, services or other thing of fictitious value, rather than for the benefit of the purchaser. *First National Bank v. Fulton*, 734.

False representations. Representations concerning the value of corporate stock which relate to no existing facts, but are mere expressions of opinion as to its future value, do not of themselves amount to false representations, such as will avoid a note given for the purchase price of the stock. *Idem.*

COSTS. See PARTITION.

COUNTIES. See MUNICIPAL CORPORATIONS.

CRIMINAL LAW.

Error in names: Harmless error. Neither the fact that the court in his instructions spelled the name of defendant "Rodgers" when his true name and that in the indictment was "Rogers;" nor the fact that the foreman of the jury signed the verdict "Ira A. Stout" while his name in the jury list was "Ira Stout," there being no question as to his identity, or that he was not the person who acted as foreman and signed the verdict, was sufficient to cause a reversal. *State v. Rogers*, 570.

Self-defense: Instruction. A violent act in self-defense is justified, where the danger was actual and urgent to the compre-

CRIMINAL LAW Continued

hension of a reasonable person. The instruction as given by the court was a correct statement of the law. *State v. Jackson*, 588.

Duty to retreat. One assaulted may stand his ground only when it reasonably appears that he can not retreat in safety. *Idem.*

Burglary: Insufficient evidence. A verdict of guilty in a criminal case will not be upheld when against the clear weight of the evidence. In this prosecution for burglary the evidence is held insufficient to support conviction. *State v. Sullivan*, 603.

Burglary: Circumstantial evidence. Where the evidence of a burglary, though wholly circumstantial, is clear and direct, and covers all elements of the charge, the verdict of guilty will not be disturbed. *State v. Rogers*, 570.

Same: Sentence: Excessive punishment. Where the purpose of a burglary was the theft of property of small value and the same was stolen to meet the necessities of poverty, a penitentiary sentence was excessive punishment, and the same is reduced to a jail sentence of nine months with credit for the time served in the penitentiary. *Idem.*

Rape: Included offenses: Instruction. Where the evidence was sufficient to support a conviction for rape, the defendant could not complain that the court permitted the jury to consider the crime of assault with intent to rape, if they found that rape had not been committed, and in that event authorized conviction for the lesser offense, which instruction the jury followed and returned a verdict of assault with intent to rape. *State v. Haugh*, 639.

Same: Corroborating evidence. The admissions of a defendant charged with rape that he had had sexual intercourse with the prosecutrix were sufficient corroborating evidence. *Idem.*

EVIDENCE.

Evidence: Admission upon motion: Discretion: Prejudice. The trial court is vested with a discretion in determining the question of diligence in procuring evidence offered upon the trial, but not submitted to the grand jury, which will not be disturbed except for an abuse of such discretion resulting in prejudice; and while an error in admitting evidence upon motion under the statute is not in all cases waived by failing to take a continuance, the failure to do so may be considered in determining the question of prejudice. *State v. Jackson*, 588.

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DRAINAGE

Evidence taken upon notice. The examination of a witness whose evidence is taken upon notice need not be strictly confined to those matters specified in the notice. *Idem.*

Threats. Recent uncommunicated threats against one charged with crime, where the plea of self-defense is interposed, are admissible for the purpose of showing who was the aggressor in the affray, but in the instant case the offered evidence is insufficient to show a threat. *Idem.*

View of premises: Discretion. Permission of the jury to view the premises where the crime with which a defendant is charged was committed, is wholly discretionary with the trial court. *Idem.*

DAMAGES. See CARRIERS—DRAINAGE—MALICIOUS PROSECUTION.

Disregard of instruction: Presumption. It will not be presumed that a direction to the jury to allow the fair reasonable value of property destroyed, as shown by the evidence, was disregarded by an allowance for property of which there was no evidence of value. *Frederickson v. Iowa Cent. R. Co.*, 26.

Verdict: Sufficiency. A verdict is sufficient to authorize a judgment if it clearly expresses the intention of the jury. The verdict for defendant in this action for breach of marriage promise, which had appended to the form as prepared by the court the words "not guilty" was not thus rendered insufficient; especially as plaintiff did not ask to have the jury reform or correct it in any manner, but simply raised the question of its sufficiency in a motion for new trial. *Wilson v. McCarty*, 660.

Verdict: Passion and prejudice. The verdict of \$3,475.67 for the death of decedent, a man of sixty years of age, was not so large as to clearly indicate passion and prejudice. *Marnan v. Chicago, R. I. & Pac. Ry. Co.*, 457.

DEEDS. See CONVEYANCES.

DRAINAGE.

Appeal: Statutes. An appeal in drainage cases is perfected by filing a notice and giving a bond; all other statutory proceedings, the filing of a transcript, payment of fee, docketing the case and the filing of pleadings, have reference to procedure after the appeal has been taken. *Elwood v. Sac County*, 407.

Dismissal of appeal. The statute requiring a party appealing

DRAINAGE Continued

from the establishment of a drainage district to file, among other things, a petition setting forth his claims and objections on or before the first day of the next succeeding term of the district court, and providing that failure to comply with the requirements will work a dismissal, is remedial and should be liberally construed, to assist and effectuate justice between the parties: So that where by mistake, accident or neglect, the appellant, having complied with all other requirements, neglected simply to file his petition until the second day of the term, but before a ruling on a motion to dismiss on that ground was made, a dismissal should not have been entered; as the neglect was in no sense jurisdictional, and could be excused. *Idem.*

Notice of appeal: Service of notice. A notice of appeal from the district court in drainage proceedings is not fatally defective because reciting in the caption the following, "In the Supreme Court of Iowa," but the same will be treated as surplusage, where enough remains to indicate the judgment appealed from: Nor need the notice be addressed to the clerk by name. And accepted service of the notice by the clerk and the filing thereof by him was a sufficient service. *Lightner v. Greene County*, 398.

Same: Waiver of right. Acceptance of the amount of a drainage assessment by the treasurer, after an appeal was taken, was not a waiver of the right of appeal, where the acceptance expressly reserved that right. *Idem.*

Assessment of benefits: Objections: Sufficiency. On appeal in drainage proceedings the appellant is confined to such objections as were made before the board of supervisors; and they must have been sufficiently specific to fairly suggest the real issue sought to be raised. The objections to an assessment in this case were sufficient to raise the questions of whether the apportionment of the expense was equitable, and whether it exceeded the benefits conferred. *Idem.*

Appeal: Burden of proof. On appeal from a drainage assessment of the board of supervisors the district court will assume that the assessment as made by the board was correct, and the party appealing has the burden of overcoming the presumption; and on appeal to the Supreme Court it will be assumed that the district court observed this rule, thus casting the burden on the appellant to show its incorrectness. *Idem.*

Assessments: Validity. The assessment of the entire cost of a tile drain running practically the entire length of a forty acre tract within a drainage district, to that particular forty acres, was erroneous. *Idem.*

DRAINAGE Continued

TO

ELECTIONS

Surface waters: Diversion. The right given a landowner to drain into a general course of natural drainage does not authorize him to gather the water on his own land, which would naturally flow in another direction, and discharge it upon the land of his neighbor. *Valentine v. Widman*, 172.

Same: Limitations. Where a drainage system did no damage to the land of an adjacent owner until it was enlarged and extended to a pond on the owner's land, an action brought within the statutory period following the extension was timely. *Idem*.

Same: Diversion of surface water: Damages. Where surface water naturally drained into a pond on the owner's land and the natural drainage of the overflow was in two directions, the construction of a drain carrying an increased portion of the overflow in one direction and onto the land of another, causing him substantial damage, created a liability therefor. And in case the pond was never likely to overflow, but the owner by diverting the water so as to materially increase the flow onto the adjacent land was liable for the damage; but in case the pond overflowed at times and the natural course of the water was onto adjacent premises at the point where the same was discharged by the owner's drain, then no cause of action arose because of the drain. *Idem*.

Same: Damages: Evidence: Instructions. Where the evidence showed that a nuisance created by a private drainage system was abated by the establishment of a drainage district, and that a portion of plaintiff's land had been flooded for a few years prior thereto by defendant's private drain, and the evidence on the question of damage would have authorized a verdict for a substantial sum on the theory that the nuisance was permanent, the verdict as returned for a much smaller sum indicated that no allowance was made for a permanent nuisance, but rather for the damage caused prior to its abatement, and defendant was, therefore, in no position to complain of evidence of damage, in support of a permanent nuisance, or of instructions permitting recovery on that theory. *Idem*.

EASEMENTS. See REAL PROPERTY.

ELECTIONS.

Contests: Primary elections: Statutes. The provisions of the statutes by which a court of contest is given authority to examine witnesses and determine contested elections to county offices have no application to primary elections. *Jones v. Fisher*, 582,

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EQUITY

Primary elections: Contest: Authority of supervisors. The power of the supervisors in case of a contested primary election is limited to a recount of the ballots as cast, on a showing of fraud, error or mistake in the count as returned by the judges of the election; they have no authority to inquire into the legality of a ballot which has been received by the judges. *Idem.*

Same: Review of illegal action of supervisors: Certiorari. Although the statute authorizing a recount of the ballots by the supervisors in a contested primary election provides that their action in so doing shall be final, such provision does not prevent a review of the illegal act of the board in determining a matter not within its jurisdiction; and *certiorari* is the proper remedy in such case. *Idem.*

Municipal elections: Records. The record of a town council is not conclusive on the question of when the polls of a municipal election were opened; as the same is not the record of the judges and clerks of the election. *Lehigh Sewer Pipe & Tile Co. v. Town of Lehigh*, 386.

EQUITY. See INJUNCTIONS.

Equitable liens: Contracts: Substance rather than form. Equity looks to the substance and not to the form of a contract. Thus where a corporation exchanged land subject to a specific mortgage indebtedness, and prior to the conveyance executed mortgages on the property to its secretary, which with the previous mortgage amounted to the indebtedness specified, it is *held* that the transaction operated in equity as a reservation to the corporation of a lien on the property for that sum, even though it be conceded that the mortgages created no actionable obligation between the parties. *Marshal Invest. Co. v. Lindley*, 6.

Same: Equitable liens: Notice. Where a corporation executed mortgages upon its property to itself as mortgagee, and conveyed the land subject thereto, the transaction is held to create an equitable lien, enforceable against subsequent grantees who acquired the title with notice of the same. *Idem.*

Reformation of instruments: Constructive trusts: Evidence. The evidence in this case is held insufficient to authorize reformation of the writings, so as to make an equal distribution of the proceeds of the land held by defendant among his brothers and sisters; or to establish a constructive trust in their favor on the theory of fraud, which must be by clear and satisfactory evidence. *Matt v. Matt*, 503.

EQUIRY Continued

TO

EVIDENCE

Specific performance. Specific performance of a contract rests largely in the discretion of the court, and will be denied where enforcement would result in great hardship, not merely pecuniary loss; or where the party complaining has been guilty of laches, or has acquiesced in the doing of the thing of which he complains. *Johnson v. Robertson*, 64.

ESTATES OF DECEDENTS.

Allowance of claims: Effect. Where the defendant in an action to subject the land secretly conveyed to him by his mother, to the satisfaction of her debt, did not appear and resist an allowance of the claim against her estate, the allowance of the claim was not *prima facie* proof of its correctness as against him. *Levi v. Levi*, 297.

Descent and distribution. Upon the death of a wife intestate, leaving children by a former marriage surviving her, but without issue as the fruit of her second marriage, her second husband surviving her would take only a one-third interest in her separate estate, which upon his death would descend to his heirs. *Husted v. Rollins*, 546.

ESTOPPEL. See ACTIONS—HIGHWAYS—INSURANCE—REAL PROPERTY.

EVIDENCE. In criminal cases. See CRIMINAL LAW. See also, AGENCY—CARRIERS—NEGOTIABLE INSTRUMENTS—PRACTICE—RAILROADS—TRUSTS.

Admissions. The admissions of a party to an action should not be excluded because his attention was not called to them while testifying as a witness. *Adams v. Chicago G. W. Ry. Co.*, 31.

Admission of evidence. The admission of plaintiff's books of account was harmless to defendant, where his own witness admitted the facts sought to be proved thereby. *Commercial National Bank v. Flickinger*, 97.

Same: Exclusion of evidence: Prejudice. The exclusion of an exhibit showing a continuation of plaintiff's claim against a third party was not prejudicial, where such party admitted his liability to the extent shown in the exhibit. *Idem*.

Admissions: Instructions. Verbal admissions should be received with great caution, because that kind of evidence is subject to imperfection and mistake; but when deliberately made and accurately proven are often entitled to much weight. The instruc-

EVIDENCE Continued

tion in the instant case is held to state the rule correctly. *State v. Jackson*, 588.

Confidential communications: Review on appeal. An objection to evidence because a confidential communication from client to attorney will not obtain, as against the uncontradicted testimony of the attorney that the relation did not exist; and if good the objection will not be considered on appeal unless first raised in the trial court. *Sutcliffe v. Pence*, 643.

Evidence of compromise: Waiver. The admission in evidence of an offer to compromise and settle a suit is reversible error, and is not waived by the cross-examination of the witness. *Kurtz v. Payne Invst. Co.*, 376.

Expert evidence: Ultimate conclusion. An expert witness may state his knowledge concerning the treatment and care of a personal injury, or basing his answers upon an assumed state of facts, may then testify that the injury in his opinion may or may not have resulted from the facts stated; but it is not permissible for him to state as an ultimate fact that the injury was thus caused; as it is the province of the jury alone to draw the ultimate conclusion. The evidence in this case was objectionable for the reason stated. *Sever v. M. & St. L. Ry. Co.*, 664.

Evidence of value: Admissibility: Irresponsive answer: Objection. The inquiry of a witness, if he knew the value of cattle in Canada during a certain month, was objectionable for indefiniteness; but as it was merely preliminary, calling for a fact touching his competency, its admission was not erroneous. And although the answer was not responsive opposing counsel could not raise that objection. *McManus v. Chicago G. W. Ry. Co.*, 359.

Offer of exhibits: Review of ruling. Where portions of a letter were offered in evidence and were excluded upon objection that the entire letter was not offered, and subsequently the introduction of the entire letter by the other party was permitted, the appellate court was not in position to pass on the ruling, in the absence of a showing in the record of the omitted portions when first offered, or to determine whether the party offering only portions was in position to object to the entire offer. *Idem*.

Motion to strike: Review. A motion to strike certain evidence from the record, which has not been ruled upon by the trial court, will not be reviewed on appeal. *Idem*.

EVIDENCE Continued

Firm books of account. Where a firm, carrying on a mercantile business, also acted as the financial agent of a party in the collection of rents and the disbursement of the funds thus collected, under the direction of such party, the entries in the firm books made in the ordinary course of business, showing advances and charges expended for the party were competent evidence against her and also against her grantee, in a suit to subject the property conveyed to the payment of her debt; and the books themselves having been properly identified and the entries having been shown to have been made in the ordinary course of the firm business, outside of its mercantile business, constituted competent evidence of the money thus received and paid out, in the absence of anything to impeach the good faith of the transactions. *Levi v. Levi*, 297.

Good faith entries: Evidence. The mere failure of a member of the firm to distribute his father's estate and turn over to the firm the share belonging to his mother, for whom the firm was acting as financial agent, was insufficient to charge the firm with bad faith and defeat its right to recover the sum due it, as shown by the account with her proven by competent evidence. *Idem*.

Variance by parol. Where an instrument is not relied upon as the basis of an action or defense, but is a mere collateral instrument of evidence, contradiction of its terms by parol is admissible, notwithstanding the parol evidence rule. Thus where a party relied upon a contract to show that certain notes were binding upon the makers though they did not contain the names of all who signed the contract, and also to rebut an inference that the notes were not to be delivered until a certain number of signatures were obtained, evidence that those signing the contract had been misled in doing so, without knowledge that the same was a contract, was admissible to destroy the probative effect of the instrument, although no fraud in procuring their signatures was alleged. *Cedar Rapids National Bank v. Carlson*, 343.

Same. Where an instrument does not specify the number of signers to be procured, nor the liability of each, evidence of an oral agreement that the same was not to become binding until a specified number of signers was obtained, was not a variance of the instrument; and was provable by parol as a condition precedent to the effectiveness of the instrument. *Idem*.

Explanatory evidence. In a suit upon notes in which the plaintiff relied upon a contract by the makers and others for the

EVIDENCE Continued

TO

FRAUD

purchase of a horse, and defendants alleged that there was an oral agreement that the payee was to secure the signatures of a certain number of solvent persons to the agreement of purchase, when the notes provided for in the contract should be executed and delivered, and also alleged that many of the signers were insolvent, evidence that one of the signatures had been erased was not erroneously admitted, where the instrument still contained the requisite number of names; as the same was simply explanatory of the fact that at one time it contained more names than when introduced in evidence. *Idem.*

Examination of witnesses. Although the court may inadvertently strike out answers of a witness containing matter not vulnerable to the objection raised, still the complaining party should by further questions call for such answers as are not objectionable, to be heard on appeal. *Idem.*

Examination by the court. The presiding judge may rightfully participate in the examination of witnesses, if by so doing he can expedite the trial or assist the witness; but to make a practice of thus interfering with the examination of witnesses is unwise. *Idem.*

Exclusion of evidence: Harmless error. Where the court instructed the jury that pleadings in another case offered in evidence should not be considered, refusal to permit a witness to explain the cause for dismissal of such action was not prejudicial; as it will be presumed that the jury followed the court's instruction. *Idem.*

FRAUD. See CORPORATIONS—SURETYSHIP.

Fraudulent conveyances: Creditor's rights: Evidence of indebtedness. When a secret, voluntary conveyance of property has been set aside at the suit of a pre-existing creditor, he may not only subject the property to payment of that portion of his claim then accrued, but also to the balance thereafter accruing. In this action the evidence is held to show that the grantor was indebted to plaintiffs at the date of the conveyance. *Levi v. Levi, 297.*

Same: Acceptance of conveyance: Knowledge of indebtedness. One who obtains title to property by a secret, voluntary conveyance and allows his grantor to retain the apparent ownership, on the strength of which credit is extended the grantor, can not insist on his right to the property as against such creditor; and it is immaterial that he had no fraudulent intent in accepting

FRAUD Continued

to

HIGHWAYS

the conveyance, or that he was unaware of the grantor's accumulating indebtedness; but in this instance the evidence discloses sufficient knowledge of the circumstances to put him on inquiry regarding the grantor's indebtedness. *Idem.*

Fraudulent conveyances: Injunction: Dissolution. In a suit to set aside a deed on the ground of forgery the plaintiff is entitled to an injunction restraining a disposition of the land pending the litigation; for even though the filing of the petition might operate as a *lis pendens* the plaintiff might be compelled to bring another action against the purchaser. And where fraud is alleged the filing of an answer in denial is not sufficient ground for dissolving a writ. *Bankers' Surety Co. v. Linder*, 486.

FRAUDULENT CONVEYANCES. See FRAUD.

GARNISHMENT. See ATTACHMENT.

HIGHWAYS.

Location: Prescription: Evidence. Where a highway was unquestionably established at some point on the land in controversy, it will be presumed, in the absence of evidence to the contrary, that the traveled way and that improved by the public is where it was originally located. In the instant case the evidence is held to show, even if the highway was not regularly established in the first instance, that the public had acquired a right thereto by prescription, and that there had been a dedication and acceptance. *Barnes v. Robertson*, 730.

Estoppel. Where a property owner, because of a highway crossing his land, obtained exemption from taxation of a strip for that purpose of a certain width, he was thereafter estopped to deny that the highway was of that width. *Idem.*

Negligence: Custom as a defense. The usual custom of performing work is not a defense to a charge of negligence for performing it in a like manner; as defendant can not avoid liability, if negligent, by a showing that it had always been negligent in the same respect. *Sewing v. Harrison County*, 229.

Repair of bridges: Special finding. Where two or more causes unite in producing an accident, all of which are proximate, because without the operation of all no injury would have occurred, liability therefor exists. Thus where a county, in repairing a bridge piled lumber on the bridge; failed to nail down new plank already laid, and piled old plank on the approach to the bridge, and it appeared that plaintiff's team became fright-

HIGHWAYS Continued

ened at the pile of new plank, then by the rattle of the unnailed plank and afterward was still further frightened by the pile of old plank, and all three grounds of negligence were submitted to the jury as charged, with instruction that plaintiff could recover if defendant was negligent in any or all respects, a special finding that the pile of old lumber at the end of the bridge was not the original cause of the fright of the team, and that the accident would not have occurred except for its fright thereat, did not negative negligence in the other respects charged and was not therefore inconsistent with a general verdict for plaintiff. *Idem.*

Bridges: Approach. Whether the approach to a bridge is part of the bridge is usually a question for the jury, and in this instance the evidence justified a finding that the pile of old lumber at the end of the bridge occupied a part of the approach. *Idem.*

Same: Instructions. With a finding that the old lumber was piled on the approach to the bridge, an instruction that defendant might be found negligent in piling the same where it would frighten teams while on the bridge or approach thereto, was not prejudicial to defendant. *Idem.*

Same: Assumption of facts. The court's statement that it was conceded that when the men quit work the laying of the new floor of the bridge was not completed, could not have been understood to mean that one of the grounds of negligence charged failure to nail the new plank, was conceded. *Idem.*

Same: Personal injury: Verdict. A verdict for \$5,394.52 is held not so excessive as to indicate passion and prejudice, where it appeared that plaintiff's spine was so injured as to permanently affect her nervous system and general health, and that she had suffered great pain as a result. *Idem.*

Improvement: Damage to abutting property. While a road supervisor is clothed with some authority in determining the method of improving the highways, still his plans for their improvement must be within the scope of reasonable discretion. He can not destroy the ingress or egress to farm property, or turn the natural drainage of surface water to the injury of adjoining owners, but must use diligence in draining the same from the highways in its natural course. In the instant case the construction of a ditch in front of plaintiff's property unreasonably and unnecessarily interfered with his access to his premises from the highway. *Haydon v. Whitaker*, 87.

HOMESTEADS

TO

HUSBAND AND WIFE

HOMESTEAD.

Abandonment: Burden of proof. Where actual occupancy of a homestead had ceased by the wife before entry of judgment against her husband, the burden was upon her to show a definite and fixed purpose to return in order to preserve and maintain her homestead rights, and avoid the effect of the judgment. *Vittengl v. Vittengl*, 41.

Same. Where both the husband and wife left their homestead intending to return, but while absent the husband abandoned his family and went to another state, his agency for the family ceased at that time and his intent thereafter regarding the homestead was not controlling as to the wife. *Idem*.

Same. One not in the actual possession of a homestead but having a definite and fixed intention of returning and occupying the same, does not abandon it by making a contract of sale with the intent of investing the proceeds in a new homestead when the sale is consummated; the intent to return not having been otherwise changed. *Idem*.

Election. Where the husband had the right to occupy premises for life and the interest of his wife in other property terminated with her death, his election to take a homestead in the other property made under a mistaken belief as to her title, did not prejudice his rights in any property acquired by the wife during marriage, or that of his heirs upon his death. *Husted v. Rollins*, 546.

HUSBAND AND WIFE. See SURETYSHIP.

Contract by husband and wife: Foreclosure: Judgment. Where a wife joined with the husband in a contract for the sale of land and in a suit to foreclose the contract, alleging that the only interest she had in the property was her inchoate right of dower, which was stipulated by the parties as a fact in the case, and she made no claim to any part of the amount due, judgment was properly rendered in favor of the husband for the full amount. *Boynton v. Salinger*, 529.

Same: Nature of judgment. The decree on foreclosure in such case should allow the purchaser a stated time in which to pay the amount found due to the clerk, with direction that the same be not paid out until a proper deed was deposited with him, and if payment was not made within the time specified, special execution should issue. *Idem*.

INJUNCTION

TO

INSANITY

INJUNCTIONS.

Restraining proceedings in another state. Courts of equity of this state have power to render decrees *in personam* restraining a defendant from proceeding in the courts of another state, where some evasion of the laws of this state intended to regulate the relations of its citizens to each other in some definite manner is threatened; but they are reluctant to interfere with the unquestioned right of a citizen to enter the courts of another state to secure such rights as may there be available to him, and will not scrutinize his motives in so doing. *Jones v. Hughes*, 684.

Same. The fact that a resident of this state may secure some advantage in another state, by bringing his suit against a resident defendant in that state, is not ground for equitable interference with the right to sue in any court having jurisdiction and competent to afford relief. *Idem*.

Same. The mere bringing of suit against a resident defendant in another state, and the attachment of property situated there, is not such unjustifiable annoyance and harassment as to warrant an interference by the courts of this state. *Idem*.

Multiplicity of suits. Equity will not interfere by injunction to restrain causeless and vexatious litigation; nor does its jurisdiction to prevent a multiplicity of suits apply to the repetition of a suit. *Idem*.

Removal of causes: Abatement. The statute authorizing the removal of a cause to the county of defendant's residence has no application to a suit brought in another state; and can not be construed so as to prohibit the bringing of a suit in another state. Nor do the provisions for abatement of actions on the ground of another action pending apply to an action pending in another state. *Idem*.

INSANITY. See CONVEYANCES.

Insane persons: Disaffirmance of contracts. The personal representative of an insane person may disaffirm and avoid his contracts. *Nutter v. Des Moines Life Ins. Co.*, 539.

Same: Verdict: Passion and prejudice. Where the evidence concerning the mental capacity of a person is such as to support a finding of insufficient capacity to comprehend and appreciate the business in hand, a verdict to that effect will not be set aside on the ground of passion and prejudice. *Idem*.

INSTRUCTIONS

TO

INSURANCE

INSTRUCTIONS. See MALICIOUS PROSECUTION.

Refusal of requests. The refusal of requested instructions involving matters covered in those given by the court on its own motion is not erroneous. *Caldwell v. Iowa State Traveling Men's Assn.*, 327.

INSURANCE.

Accident insurance: Proximate cause. Where death follows from a disease, the natural though not necessary consequence of an accidental injury, it may be deemed the result of the injury and not of the disease; under the provisions of a policy requiring that death must result solely from accidental means to create a liability. *Caldwell v. Iowa State Traveling Men's Assn.*, 327.

Same: Accidental injury: Burden of proof. The plaintiff, in an action upon a policy providing liability for death, the result of external, violent and accidental means, has the burden of showing not only the death of the assured but also that it was caused by such means. Proof, however, of the existence of the injury will support a finding that the cause was violent and external, without a showing of the circumstances causing it. *Idem.*

Same: Accidental injury: Presumption. In the absence of direct evidence on the subject it will be presumed that a personal injury was not intentionally inflicted either by an assured or by another; and this presumption is available as affirmative evidence, from which the jury may infer that it was caused by accidental means. *Idem.*

Benefit insurance: Action to recover sick benefits: Evidence. In this action for the recovery of sick benefits under by-laws of the order providing that it should pay no benefits for sickness or disability originating while a member was in arrears, or within thirty days after payment of such arrears, the evidence is held to show that deceased had recovered from a disease commencing while he was in arrears, and that another disease from which he died originated more than thirty days after payment of his arrearages. It is also held that in the absence of evidence to that effect no presumption arose that the latter disease resulted from or was in any way connected with the former. *Westfall v. Bedford Lodge I. O. O. F.*, 615.

Benefit insurance: Beneficiaries: Rights of parties. The beneficiary named in a certificate of mutual benefit insurance has

INSURANCE Continued

no vested or property interest therein which is the subject of sale and transfer, and the extent of the insured's control over it is the right to select a new beneficiary; so that any promise on his part to keep the same in force for the benefit of another in case of the death of the beneficiary named, will not create an enforceable obligation. Thus where the rules of the association provided that in case the beneficiary was not living at the death of a member, his wife, if living, should be entitled to the benefit, but if not, then it should be paid to his children: *Held*, that upon the death of the beneficiary and later the assured, without change in beneficiary, his second wife was entitled to the benefit, although he had promised his first wife, the named beneficiary, that he would keep the certificate alive for the benefit of a child of the first wife. *Cooper v. Order of Railway Conductors*, 481.

Same: Estoppel. The party claiming an estoppel has the burden of proof on that question. In the instant case the evidence is held insufficient to show that decedent's second wife was estopped from claiming the benefits under the certificate, as against a child by his first wife; the certificate as originally issued providing for payment of benefits to the widow, if living, and no change ever having been made. *Idem*.

Benefit insurance: Assessments: By-laws: Construction. A member of a purely mutual insurance association can not be assessed for losses occurring prior to his membership, unless he has agreed to pay such assessments. The by-laws in the instant case do not authorize such assessments; but if ambiguous in that respect they must be construed strictly against the association to avoid forfeiture. *Clark v. Iowa State Traveling Men's Assn.*, 201.

Same: Diversion of funds. A mutual insurance company has no power to create an emergency fund from dues and assessments paid by its members for another purpose, unless its charter and by-laws so provide; and such a fund not so provided for is illegally created. *Idem*.

Same: Diversion of funds: Estoppel. The fact that a member of a mutual insurance association received a copy of a resolution in the form of a recommendation for the creation of an emergency fund from funds paid for other purposes, and made no protest against the proposition, would not prevent his beneficiary from contesting the validity of the fund; in the absence of evidence that he knew of the existence of the fund or that his payments had been diverted thereto. *Idem*.

INSURANCE Continued

Same: Assessments: Forfeiture. Where a mutual association has demanded and received larger assessments than it was entitled to, the excess is held as a credit for future assessments; and where such credit exists the membership can not be forfeited. *Idem.*

Same. An insurance association has no right to divert the payments made by a member to another fund illegally created, or to transfer thereto money from the general fund to which he has contributed; nor can he be compelled to contribute to a fund already in excess of that authorized. *Idem.*

Same: Accident insurance: Cause of death: Evidence. In this action upon an accident certificate the evidence is held to show that the member was drowned, and to authorize recovery under a provision creating liability for bodily injuries through external, violent and accidental means, which independent of other causes resulted in death. *Idem.*

Same: Burden of proof. The burden in this action was upon plaintiff to show that death resulted from a cause within the terms of the certificate; and this burden was met by a showing that the member was drowned while bathing, and is not overcome by the mere fact that he voluntarily entered the water. *Idem.*

Contract by incompetent: Validity. Where an insurance contract gave to the assured several optional settlements, an exercise of either involving a knowledge of his rights and the effect upon him and those dependent upon him, a settlement thereunder was in itself a new contract and not merely the performance of one already made, and was invalid if the assured at the time of making settlement was mentally incapable of exercising a deliberate judgment. *Nutter v. Des Moines Life Ins. Co., 539.*

Avoidance of contract: Status quo. Where the parties can be placed in *statu quo*, the contract of an insane person will be set aside, even though the other party did not know of the disability, and the entire transaction was fair and free from fraud. Thus where the policy was recognized as in full force, and cash settlement was made with the insured when mentally incompetent, the parties could be placed in *statu quo*, in a suit by the beneficiary, by deducting from the amount of the policy the sum paid in settlement and existing loans. *Idem.*

Evidence: Representations of insured. The purpose of the statute requiring that all representations and warranties by the in-

INSURANCE Continued

to

INTERSTATE COMMERCE

sured shall be attached to the policy is that all parts of the contract may be together and the insured may be in possession of the evidence of his contract; and a failure to do so precludes the insurer from pleading or proving any representations not so attached to the policy: So that where the insured made no representations in his original application concerning the use of liquor, the representation in an application for reinstatement that he was in good health and did not use alcoholic liquor to any greater extent than originally warranted was not admissible. *Idem.*

Surrender of policy: Suit by beneficiary. The setting aside of a contract of settlement and surrender of a policy of insurance, made by the insured when mentally incompetent, is not a prerequisite to an action on the policy by the beneficiary. *Idem.*

Rights of insurer: Subrogation. Where insured property is burned because of the wrongful act of a third person, the insurer, upon paying the indemnity, is entitled to be subrogated to the rights of the insured against the wrongdoer; and this right does not depend upon any such condition in the policy. But the insured in leasing property may release the lessor from any liability for injury resulting from the lessor's negligence, and this will deprive the insurer of the right of subrogation. *Gerlach v. Grainshippers' Ins. Assn., 33.*

Same. Where the lessee of property released the lessor from all liability in case of loss from fire, and subsequently insured the same, notifying the company of the lease but not of the release provision, and the policy provided that in case of loss through the negligence of any person, the insurer, upon payment of the same, should be subrogated to that extent to all the rights of the insured: *Held*, that upon destruction of the property through the negligence of the lessor the provision releasing it from liability did not avoid the policy; as the contract for subrogation only extended to such rights as the insured had, and was not a covenant as to any right whatever. *Idem.*

Same: Adjustment of loss: Effect. Under the foregoing circumstances a tender to the plaintiff by the insurance company of the full amount of its liability, on the one condition that plaintiff assign his cause of action against the party through whose negligence the loss occurred, and acceptance with a written tender of the assignment, constituted an adjustment of the loss binding upon both parties, in the absence of fraud or mistake, regardless of any defenses which may have existed in favor of the company. *Idem.*

INTERSTATE COMMERCE. See CARRIERS.

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INTOXICATING LIQUORS.

INTOXICATING LIQUORS.

Consent: Appeal: Intervention. Any citizen may intervene under the mulct law, on an appeal to the district court from a finding that the statement of consent to the sale of liquor was insufficient, and defend the action of the board. *Anderson v. Webster County*, 153.

Same: Statement of consent: Withdrawals. Withdrawals of signatures from a statement of consent, or withdrawals of withdrawals, will not be considered after the board has begun the canvass of the petition. *Idem.*

Canvass of consent: When to be made. Statements of consent to the sale of liquor must be canvassed by the board of supervisors at a regular meeting of that body as fixed by statute, or at a future date to which such meeting has been adjourned. *Beatie v. Roberts*, 575.

Same: Supervisor meetings: Adjournment. Where the board met for the regular January session, two of its members having just been re-elected, and transacted the unfinished business of the preceding year and thereafter the newly elected members qualified, and the new board organized and proceeded with its business without other interruption, there was in fact no final adjournment of the regular session, although their record showed an adjournment *sine die*; as an adjournment contemplates the act of separation and departure of the members of the board for some period of time: So that the board was in regular session and could legally canvass the statement of consent at that meeting. *Idem.*

Canvass of consent: Publication of notice. The statutes requiring the publication of notice for the canvass of a petition of consent to the sale of intoxicating liquors in the official newspapers of the county, was satisfied by publication in the papers treated and recognized as the official papers for the year, although the record of the supervisors failed to show the re-appointment or selection of such papers. *Jackman v. Blackhawk County*, 620.

Filing of poll list: Jurisdiction. The poll books of the last city election by which the sufficiency of the signatures to a petition of consent to the sale of liquor is to be determined are those filed with the county auditor, the existence of which and the filing of the same in compliance with the statute are jurisdictional. So that where a poll book was not filed within the statutory time and before the canvass of the petition of consent,

INTOXICATING LIQUORS Continued

neither the supervisors nor the court on appeal had jurisdiction to act on the petition; and the subsequent authentication of the poll book was not sufficient to confer jurisdiction. *Idem.*

Verification of signatures: Reputable person. A person who has been convicted of violating the liquor laws, with no evidence by the party having the burden of showing his reputable character, that since such conviction he has been engaged in a lawful business, is not qualified as a reputable person to verify the signatures to a petition of consent to the sale of liquor, within the meaning of the statute requiring the same to be so verified. *Idem.*

Jurisdictional facts: Burden of proof. The statutory qualifications required of signers to a petition of consent and of the persons verifying the same are jurisdictional matters; and where the contestants put their qualification in issue the parties inaugurating the proceedings have the burden of establishing the jurisdictional facts, at least to the extent of making a *prima facie* case. *Idem.*

Petition: Verification of signatures. Where a party verifying the signatures to a petition of consent admitted changing names on the petition to make them conform to the poll lists, and was unable to point out the names so changed, the petition verified by him was not in compliance with the statute. *Idem.*

Canvass of petition: Review on appeal. Where neither the board of supervisors nor the district court in canvassing a petition of consent made a schedule of the individual names admitted or rejected, the Supreme Court can not review the proceedings with respect to the disputed identity of names with any degree of certainty or satisfaction. *Idem.*

Contempt: Conviction. A judgment of contempt for violation of an injunction prohibiting the sale of liquor is not a conviction within the meaning of the statute providing that one convicted of the illegal sale of liquor, or permanently enjoined from making sales, shall not thereafter be permitted to sell liquor for a period of five years, as the term "convict" ordinarily means a finding of guilty by the verdict of a jury. *Judge v. Powers, 251.*

Same: Judgments: Immaterial findings. Where a judgment of contempt for violation of a liquor injunction found that defendant had violated the injunction on certain days, the further recital that defendant thereafter complied with the law and the terms of the injunction, and had been since that time lawfully conducting the business, was immaterial and no part of the judg-

INTOXICATING LIQUORS Continued

TO

JUSTICE OF THE PEACE

ment; as a judgment is the final determination by a competent judge or court of matters submitted by the parties for decision, and findings or recitals embraced in the same instrument, but not essential to or involved in the judgment, will not affect its validity. *Idem*.

Nuisance: Pleading: More specific statement. Generally the keeping of intoxicating liquor with intent to sell the same as a beverage is presumptively in violation of the law and constitutes a nuisance; and a petition alleging such facts is not subject to a motion for a more specific statement, though accompanied by an affidavit stating that the mulct law was in force and defendant was conducting a saloon thereunder. *Knauss v. Gruenwald*, 331.

JUDGMENTS. See ATTACHMENTS—HUSBAND AND WIFE—INTOXICATING LIQUORS—MARRIAGE AND DIVORCE—SURETYSHIP.

JURISDICTION. See ACTIONS—JUSTICE OF THE PEACE.

JURORS.

Qualification: Oaths. A person otherwise competent as a juror may take the oath, regardless of his religious convictions, provided he regards it in the form administered as binding upon his conscience; and if taken without objection it will be assumed that he so regards it: So that even though a juror denied belief in a Supreme Being, future reward or punishment, or in the Scriptures, but took the usual oath, he was not disqualified by reason of his unbelief. *State v. Jackson*, 588.

JUSTICE OF THE PEACE.

Appeal: Jurisdiction. Where the amount involved in an action in justice court was less than one hundred dollars, the justice therefore having jurisdiction, the Supreme Court on appeal will not acquire jurisdiction, in the absence of a certificate of the judge of the district court; and if the justice was without jurisdiction because more than one hundred dollars was involved then the appellate court would not acquire jurisdiction of the appeal. *Orchard v. Kirk*, 374.

Submission of cause: Continuance: Jurisdiction. Where a justice court took a case under advisement at the close of the evidence, the parties agreeing to make their argument in the form of written briefs to be filed later, there was not a final submission at the time the case was taken under advisement,

JUSTICE OF THE PEACE Continued to MALICIOUS PROSECUTION

so as to require the entry of judgment within three days thereafter, but rather a postponement until the filing of briefs: Nor did the justice lose jurisdiction on the ground of an indefinite adjournment, as it was competent for the parties to agree to a continuance to a time to be fixed by the justice. *Moir v. Bourke*, 612.

LEASES. See REAL PROPERTY.

Enforcement. One not a party to a lease of real estate, in connection with which there is a building restriction agreement, is in no position to enforce the agreement. *Johnson v. Robertson*, 64.

LIENS. See ATTACHMENT—ATTORNEYS—CHATTEL MORTGAGES—EQUITY—JUDGMENTS—MORTGAGES.

LIMITATION OF ACTIONS. See CARRIERS.

MALICIOUS PROSECUTION.

Probable cause: Effect of settlement. As a general rule the settlement or attempted settlement of a debt with an accused does not of itself show that a criminal prosecution was instituted without probable cause; and it is also generally true that a dismissal of criminal proceedings brought about by the accused, or by reason of a settlement, is not such a termination of the proceedings as will justify an action by the defendant therein for malicious prosecution; but an agreement not to prosecute upon payment of a debt is *prima facie* evidence of want of probable cause, which, in the absence of evidence to the contrary becomes conclusive. *White v. International Text Book Co.*, 210.

Same. Ordinarily an action for malicious prosecution will not lie for the prosecution of a civil suit; but if there has been a seizure of goods or an arrest of the defendant therein it will lie. *Idem.*

Essential elements. To sustain an action for malicious prosecution the previous prosecution must be shown, its instigation by the defendant, its termination by acquittal or discharge of plaintiff, want of probable cause and malice. There must be a complete termination of the original prosecution, but this may be shown by an acquittal, discharge after preliminary examination, or by a dismissal of the prosecution. *Idem.*

Right of recovery: Effect of conviction. Conviction of an accused upon false testimony and without foundation in law

MALICIOUS PROSECUTION Continued

will not defeat an action for malicious prosecution: Nor will an acquittal entitle him to recover if it is shown that he was in fact guilty of the original charge against him. *Idem.*

Probable cause. Probable cause is a defense to any action for malicious prosecution; so that settlement of an action for malicious prosecution of a civil suit by payment of money, either upon defendant's procurement or by a settlement understandingly made and without duress, is a distinct admission that something was due and constitutes a defense to the action for malicious prosecution. *Idem.*

Malice. If one uses the criminal law for some collateral or private purpose, rather than to vindicate the law itself, or knowing that only a civil wrong has been committed, he will be deemed to have acted maliciously. *Idem.*

Termination of prosecution. The dismissal of a prosecution with the taxation of costs against the county is a sufficient termination of the proceeding to authorize an action for malicious prosecution. *Idem.*

Settlement of prosecution: Duress: Evidence. The settlement of a prosecution by one charged with a crime must have been voluntary on his part to prevent his suing for malicious prosecution. In this action the evidence is held to show that settlement of the prosecution was induced by duress and that the proceeding was instituted to compel payment of a civil debt. *Idem.*

Probable cause: Evidence. Before commencing a criminal prosecution the complainant must use ordinarily reasonable and prudent means to ascertain the facts upon which the prosecution is based; and the question of probable cause is for the jury except where the evidence is such that all reasonable minds must reach the same conclusion therefrom. *Wilson v. Thurlow, 656.*

Advice of counsel as a defense. The advice of an attorney to constitute a defense to an action for malicious prosecution must be based upon a full and fair statement of all the facts within the defendant's knowledge, and the advice must have been acted upon in good faith and with a belief that there was good cause for the prosecution; and these are generally questions for the jury. *Idem.*

Conspiracy. Evidence that several persons were jointly instrumental in filing a criminal information thus causing a prosecution, and of their participation therein, will justify a finding of a conspiracy to prosecute the plaintiff. *Idem.*

MALICIOUS PROSECUTION Continued

TO

MARRIAGE AND DIVORCE

Malice. Malice may be inferred from want of probable cause; and such inference alone will support a finding of malice. *Idem.*

Probable cause: Malice: Instructions. Where the court instructed that plaintiff must show that he was prosecuted substantially as alleged in the petition, that the prosecution was malicious and without probable cause and he must so prove, an instruction that defendants admitted that plaintiff was prosecuted substantially as alleged, was not objectionable as leading the jury to think that probable cause and malice were admitted. *Idem.*

Conspiracy: Evidence. Evidence that defendants agreed that one of them should file an information causing the arrest of plaintiff, and that they should jointly assist in the prosecution, justified a finding that they both instigated or procured the prosecution, and rendered both liable for malicious prosecution. *Idem.*

Damages: Instruction. Where the plaintiff asked as part of his damages a certain sum for attorney's fees, and the evidence showed that he had paid or agreed to pay a less sum, and there was no showing that the jury allowed more on this item than the evidence warranted, the instruction that they might allow such attorney's fees as were proven, not in excess of the amount claimed, was proper. *Idem.*

MANDAMUS. See ACTIONS—RAILROADS.

MARRIAGE AND DIVORCE.

Judgments: Divorce and alimony: Effect. The entry of a judgment against a married man, pending a suit for divorce in which his property was attached by his wife to secure her alimony, created a lien against his nonexempt real estate at the date of its entry; and the lien was unaffected by a decree of divorce, to which the judgment creditor was not a party, awarding the property to the wife subject to liens prior to her attachment. *Vittengl v. Vittengl*, 41.

Judgment for alimony: Appeal: Amount of bond: Reformation. On appeal from a judgment for alimony payable in monthly installments the appeal bond need not be for the full amount of the judgment, but liability on the bond may be limited to the amount which will accrue pending the appeal; and where the court fixed the amount of the bond to cover that portion of the judgment accruing pending appeal, but by mistake it was drawn to cover the entire judgment, it may be reformed to conform to the order of the court. *Russell v. Russell*, 674.

MASTER AND SERVANT

TO

MORTGAGES

MASTER AND SERVANT. See NEGLIGENCE.**MISCONDUCT.** See NEW TRIAL.**MONEY HAD AND RECEIVED.** See PARTIES.**MORTGAGES.**

Concurrent liens: Effect of assignment. Separate mortgages simultaneously executed, between the same parties and covering the same property are not necessarily to be regarded as a single instrument, but each as a distinct contract complete in itself; and when simultaneously filed they create concurrent liens, and in the absence of an agreement the assignment of one will not give it priority over the other. *Dahlstrom v. Ablieter*, 187.

Foreclosure of one concurrent mortgage: Effect. The foreclosure by the mortgagee of one of two concurrent mortgages covering the same property, after an unrecorded assignment of the other, will not discharge the assigned mortgage; the assignee not having been made a party to the foreclosure and there having been no reference to the assigned mortgage in the foreclosure proceedings. *Idem*.

Foreclosure: Redemption by lienholder. To authorize redemption by a lienholder of land of his debtor sold under a mortgage foreclosure, he must pay to the clerk the amount necessary to redeem and file the affidavit required by the statute, stating the nature of the lien and amount due thereon; and failing to file the affidavit the clerk may treat the deposit as insufficient to effect redemption. *Iowa Loan & Trust Co. v. Kunsch*, 91.

Deposit of redemption money. The statute requires an actual deposit with the clerk of the amount necessary to redeem from a mortgage foreclosure and sale; a tender and offer to pay the same is not sufficient. *Idem*.

Withdrawal of redemption money. The withdrawal of a deposit made with the clerk to effect redemption terminates any right of redemption based on the deposit: So that where the redemptioner withdrew his deposit on taking an appeal from the action of the clerk in denying relief, his right was lost, as the money was no longer subject to the order of the court. *Idem*.

Review of clerk's action: Procedure. Code, section 4057, provides a summary method for presenting questions relating to the right of redemption to a court or judge; and the aggrieved

MORTGAGES Continued

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MUNICIPAL CORPORATIONS

party must raise the question as to his right to make redemption, and to require the clerk to accept his offer to redeem, in accordance with its provisions and not otherwise. *Idem.*

Mortgage provisions: Endorsement on notes: Effect. Where certain provisions are expressed in a mortgage, the fact that the same appear as endorsements on the back of notes secured by the mortgage neither adds nor detracts to the force of the provisions, as between the original parties; as where the mortgage provided that the mortgagor should not be liable beyond the valuation of the land. But as the notes in this instance were placed with third parties as collateral security the indorsement was proper because conveying notice of the mortgage provisions to the holders. *Matt v. Matt, 503.*

Same: Prior negotiations: Evidence: Notice. The provisions of a mortgage as finally executed can not be affected by a letter written during negotiations leading up to its execution: Nor can parties interested complain of want of notice of the provisions contained in a mortgage duly recorded. *Idem.*

Satisfaction and discharge. Where a mortgage was given as additional security to a bank from which the mortgagee had borrowed money for the benefit of the mortgagor, and not as additional security to the mortgagee, it was of no validity in the hands of the mortgagee after he had paid the debt to the bank and the notes held by it were returned to him. *Lingenfelter Bros. v. Bowman, 649.*

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Counties. Each session of a board of supervisors necessarily terminates prior to the day fixed by statute for a succeeding regular session. *Beale v. Roberts, 575.*

Qualification of supervisors. Newly elected supervisors should qualify immediately upon the convening of the regular January session of the board; but re-elected members failing to do so are authorized to act until their subsequent qualification; besides in this instance, there was a quorum for the transaction of business without them, and in either contingency the business was legally transacted. *Idem.*

Organization of board. The statute requiring a newly organized board of supervisors to elect one of its members chairman is directory in character, and mere delay in doing so will not impair the validity of its acts. *Idem.*

MUNICIPAL CORPORATIONS Continued

Same: Parol evidence: Admissibility. Oral evidence that there was no final adjournment of the board was not in contradiction of the recital of an adjournment *sine die*, but was admissible to aid in determining from the record what was in fact done. *Idem.*

Boards of supervisors: Amendment of records. A board of supervisors has power to amend its record so that it shall speak the truth, but an amendment showing that the board took a recess rather than adjourned to another day was not material; as the terms are synonymous and mean a postponement to a time specified. *Idem.*

Same: Adjournment of meetings. The board of supervisors has power to adjourn its meetings from day to day; and where the record shows that an adjournment was taken for the purpose of transacting business, which for some stated reason could not then be done, the date to be determined by the happening of a future event, as the completion of an examination by an except of the county treasurer's books, the adjournment was from time to time, within the meaning of the statute. *Idem.*

County printing: Procedure. In contests over the selection of county newspapers, and the awarding of county printing, the protests and pleadings should not be construed with too much strictness; as the proceedings are largely informal in character, before a board not accustomed to judicial procedure, and usually conducted by the contending owners of the newspapers. *Cherokee Times v. Cherokee Republican*, 282.

Appeal: Service of notice. An appeal from the action of the supervisors in designating official county newspapers is to be taken as in ordinary actions, by service of notice upon the publisher against whom the protest has been lodged; it need not be served upon any county official. *Idem.*

Letting of contracts: Rights of lowest bidder. Both the statute and an agreement by which public work is let to the lowest bidder are for the benefit of the taxpayers rather than that of bidders; and in the absence of fraud an unsuccessful bidder, although the lowest, has no remedy because not awarded the contract. *Mortland v. Poweshiek County*, 720.

Rejection of bids: Personal liability of officers. A board of supervisors acts as a governmental agency in contracting for county work, and the supervisors are under no personal liability, in an action against the county only, for failing to let the contract to the lowest bidder. *Idem.*

MUNICIPAL CORPORATIONS Continued

Pleadings. Allegations of wilfulness, neglect and wrong on the part of supervisors in failing to let a contract to the lowest bidder are immaterial, where the action is not against the members of the board personally, and the right to reject a bid existed. *Idem.*

Cities: Commission form of government: Powers. Cities, including those organized by special charter, adopting the commission form of government retain the powers previously exercised. *City of Keokuk v. Kennedy*, 680.

Extension of limits: Review of proceedings: Certiorari. In the absence of fraud the action of a town council or of the electors in extending the limits of the incorporation can not be reviewed by *certiorari*, on the ground that there was no necessity for the extension; hence evidence that the purpose of the extension was to derive revenue from the town, to sell bonds and to increase the indebtedness, was not admissible: Nor in such a proceeding can there be a recount of the ballots cast on the question of extension. *Lehigh Sewer Pipe & Tile Co. v. Town of Lehigh*, 386.

Special charter cities: Bridge taxes. A county has no authority to levy a bridge tax on property within special charter cities, but such cities have exclusive power to levy such taxes to be expended for bridge purposes within their limits; and this right is not affected by adoption of the commission form of government. *Idem.*

Assessment: Appeal. On appeal from the levy of a paving assessment the property owner can not for the first time raise the question of the validity of a modification of the paving contract. *In re Appeal of Mayden*, 157.

Same: Presumption: Objection to assessment. Where a city induced a contractor to modify his original paving contract it will be presumed that the modification was for the public interest; and where the agreement as modified was literally carried out, a property owner objecting to an assessment must first impeach the modification before he will be heard to object that the original contract was not performed. *Idem.*

Assessment of abutting property: What property assessable. The statutes relating to the assessment of property for a street pavement contemplate that only that part of a lot or parcel of land actually abutting upon the street shall be assessed for the improvement: So that where a portion of a lot is separated from the street by another portion of the same lot owned by

MUNICIPAL CORPORATIONS Continued

a different person, the separated portion is not assessable, though owned by the person owning that part contiguous to the street, and although the same lies within 150 feet of the street. *Kneeb v. Sioux City*, 607.

Construction of walks: Grade. The statute providing that a permanent sidewalk shall not be built until the bed of the walk has been graded does not require that the bed of the walk shall be precisely at grade; it may be desirable that the top of the walk when completed shall be somewhat higher than the established grade, for drainage or other reasons. So that specifications for a walk providing that the city should make the excavation necessary to bring the street to grade, the contractor to make such excavations as would be displaced by the walk, were in accordance with the statute. *Kaynor v. City of Cedar Falls*, 161.

Same: Assessments for cross walks: Injunction. The statutes do not authorize an assessment for cross walks against corner or other lots; so that an ordinance requiring the owners of corner lots to construct their walks in front of their property through to the curb line, was to that extent void and the attempt to force property owners to construct the walk between the lot line and the curb line in the manner considered, constituted a fraud on such owners. *Idem*.

Public improvement: Resolution of necessity. The statutes contemplate that the resolution of necessity for the construction of a public improvement, which is to be made at the expense of abutting property, shall describe the adjacent property to be assessed; and failing to do so a contract for the work is invalid. *Dunker v. Des Moines*, 292.

Same: Sewerage: Presumption as to outlet. Failure in the first instance to provide an outlet for a sewerage system will not render a contract for the construction of the work invalid; as it will be presumed that the city will provide such an outlet as will render the system serviceable. *Idem*.

Streets: Added width: Rights of city. Under an agreement of the owners of property abutting on a street to add to the width of the sidewalk in front of the property and not to erect buildings thereon, with no intention to dedicate the same but rather to hold it for the convenience of the owners, the use of the strip by the public will be deemed referable to the agreement with no right thereto in the city, except such as the agreement may confer; and such use will not ripen into a title or claim by prescription. *Johnson v. Robertson*, 64.

MUNICIPAL CORPORATIONS Continued to

NEGLIGENCE

Viaducts : Assessment of damages: Costs. The costs occasioned by the assessment of damages to abutting property for the construction of viaducts, including a reasonable attorney's fee, with those incurred by an appeal, are taxable against the city, if the damages are increased on the appeal. *Globe Machinery & Supply Co. v. Des Moines*, 267.

Same: Appeal: Waiver of right of recovery. The acceptance by a property owner of a part of the damages assessed, over which there is no controversy on appeal, will not waive the appeal as to a right to recover those matters which are controverted. *Idem.*

NAMES. See CRIMINAL LAW.

NEGLIGENCE. See CARRIERS—RAILROADS.

Master and servant: Guarding dangerous machinery: Factory act: Construction. Where specific descriptions in a statute of persons or things are followed by general words not so specific, the latter descriptions are to be construed as applicable to a class of persons or things alike or similar to those designated by the preceding specific descriptions; unless the specific words describe things of different classes, or include all things in their class, or an application of the rule would render the general words meaningless. The factory act providing that "all saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description shall be properly guarded," is construed as an exception to the general rule, in that the specific descriptions refer to machinery or parts of machinery different from one another, and therefore the term "machinery of every description" was intended to comprehend all machines of a character dangerous to employees operating them without proper guards. *McCarney v. Bettendorf Axle Co.*, 418.

Same. Wherever any machine is shown to be dangerous to employees when operated without proper guard, the requirement of the statute to guard the same becomes as mandatory as if the same was particularly described therein; and proof of its operation unguarded makes a *prima facie* case of negligence. In the instant case the evidence is held to show a traveling crane is such a machine and requires guards. *Idem.*

Same. The fact that machinery is located some distance above the floor will not relieve the master of the duty of properly guarding it, if of such a character that injury to employees is reasonably to be apprehended when required to work about it. *Idem.*

NEGLECT Continued

Same: Contributory negligence. The evidence in this case is held insufficient to show as a matter of law that plaintiff was guilty of contributory negligence in placing his hand upon the track of a running crane. *Idem.*

Same: Safe place to work: Submission of issue. It is also held that the evidence was sufficient to justify a finding that some provision for warning plaintiff of the approach of the crane was necessary to render the place where plaintiff was at work safe, and hence a submission of the employer's negligence in this respect was proper. *Idem.*

Master and servant: Negligence: Evidence. In this action for the death of an employee the evidence is held to require submission of the question of defendant's negligence in ordering decedent to work in a place of peril, in failing to warn him of the danger and to provide suitable tools. *Herr v. Green, 532.*

Same: Contributory negligence. An employee is not guilty of contributory negligence in obeying the order of a superior, unless in doing so the danger is so apparent that no ordinarily prudent person would attempt it of his own volition. In this action the evidence is held to present an issue for the jury as to the negligence of decedent in obeying an order to loosen a rock at the ledge of a quarry. *Idem.*

Master and servant: Rules of employment: Negligence. A mere custom adopted by employees for their own safety, though known to the employer, will not as a matter of law relieve the master of the duty of establishing a system of carrying on the work, which will with reasonable certainty avoid injury to the workmen from the operation of machinery with which they are engaged. Under the evidence in the instant case it is *held*, that the question of whether the custom of signaling the starting of the engine in an adjoining room, as adopted by employees, was the equivalent of such a system of warning as the defendant should have provided, was for the jury. *Hunter v. Northern Iowa Brick & Tile Co., 257.*

Same: Assumption of risk. One engaged in the repair of machinery may assume that a proper system of warning employees of the starting and stopping of the machinery by a co-employee has been established and will be enforced; and if unaware of the master's failure to provide such a system he may assume that the system adopted by an employee charged with the operation of the machinery was known to and adopted by the employer; and he need not inquire into the sufficiency of the system for

NEGLIGENCE Continued

TO

NEGOTIABLE INSTRUMENTS

his safety, or whether it had been recognized by the employer as an essential condition under which the work should be done; and the question of assumption of risk is for the jury, unless the evidence is such that the injured party, as a reasonably prudent person, must have appreciated the danger involved. *Idem.*

Same: Contributory negligence. The question of plaintiff's contributory negligence in working about a pulley without a platform on which to stand, and under circumstances requiring him to maintain his position by holding onto a support, and thus working under the assumption that the machinery would not be started without warning, was for the jury. *Idem.*

Master and servant: Issues: Pleadings: Instructions. In this action to recover tips paid an employer by mistake, in which a settlement was pleaded by defendant, and in reply plaintiff pleaded that the settlement was procured by fraud and that he was a minor and had disaffirmed it, a failure to instruct as to the effect of the settlement was without prejudice to the defendant, where the jury found that the tips were personal gifts to the plaintiff and that he had not contracted to pay them to defendant; as the action was not upon any contract requiring repudiation to entitle plaintiff to recover, and under the facts proven defendant could not avoid liability on any theory. *Zappas v. Roumeliote*, 709.

Same: Compensation of servant: Tips: Burden of proof. Tips given a servant, over and above the regular charge for the service, belong to the servant; and the burden is upon the employer to show a contract by which they were to be turned over to him. *Idem.*

Holder in due course. The question of whether the purchaser of a note is one in due course is immaterial where the maker has no valid defense to a suit thereon. *First National Bank v. Fulton*, 734.

Failure of consideration: Evidence. Proof of partial failure of consideration will not support a plea of total failure. In this action upon a promissory note the evidence does not establish total failure of consideration. *Idem.*

NEGOTIABLE INSTRUMENTS. See BANKS AND BANKING.

Compromise and settlement: Evidence. In this suit upon promissory notes the evidence is held insufficient to show that the same were included in a prior settlement between one of the

NEGOTIABLE INSTRUMENTS Continued to

NEW TRIAL

joint makers and the payee. *Commercial National Bank v. Flickinger*, 97.

Same: Exclusion of evidence: Prejudice. Where a party claimed payment of a note by another party jointly liable, a letter written by such party to his attorney in relation to a settlement between himself and the holder of the note and dictated in the presence of plaintiff, was not admissible against it, in the absence of any showing that it was advised of the contents of the letter; and in this instance exclusion of the letter was not prejudicial, as it was only material on an issue which the court might properly have withdrawn from the jury. *Idem*.

Delivery: Evidence. Where the evidence showed that the notes in suit were delivered to a third person to be held by him until the seller of property for which they were given had performed the conditions of sale, evidence of a voluntary payment by the seller of the third person's services, and acceptance by him, was not competent to show that the seller had performed his obligations and that defendant regarded the transaction as completed at that time. *Cedar Rapids National Bank v. Carlson*, 343.

Same: Instructions. Where the defense pleaded to a suit upon notes was an oral agreement that the notes were not to be delivered until a certain number of responsible persons had signed the same, and there was evidence of an oral and also a written agreement to that effect, but no complaint was made during the trial of a variance between the allegations and the proof, and the court correctly stated the issues and instructed on the burden of proof, failure to instruct on the oral agreement alone was not misleading. *Idem*.

Genuineness of signature: Evidence. In this action upon a promissory note the evidence is reviewed and in conjunction with a comparison of signatures is held sufficient to show the genuineness of the signature to the note. *Blakesburg Savings Bank v. Burton*, 671.

NEW TRIAL.

Delay in filing motion. Where the affidavits in support of a motion for a new trial were not filed for some time after the time for filing the motion had expired, although the motion itself was filed within the time, the court was justified in overruling the motion. *Smith v. Suechting*, 712.

Same: Newly discovered evidence. The court did not abuse its discretion in overruling a motion for new trial on the ground

NEW TRIAL Continued .

TO

OCCUPYING CLAIMANTS

of newly discovered evidence, in an action for slander, where the proffered evidence was cumulative and only tended to establish the justification pleaded as to part of the admitted slanderous words used. *Idem.*

Misconduct in argument. Alleged misconduct of the prosecuting attorney in argument in saying that defendant was guilty beyond all reasonable doubt, and that he ought to be convicted for the protection of other young girls in the county, was not reversible error; as it will be presumed that the jury would give the remarks of counsel no weight as evidence, and that they would understand one object of conviction to be the prevention of similar crimes. *State v. Haugh*, 639.

Evidence: Exhibits. The stained clothing worn by prosecutrix at the time of the offense was admissible in evidence, though its probative force was materially lessened by the time at which the blood stains were first observed. *Idem.*

Misconduct : Argument: Review on appeal. The unverified statement, in a motion for new trial, of alleged improper argument of counsel is not a sufficient showing of misconduct to authorize its review on appeal. *Wilson v. McCarty*, 660.

Same. Where the argument of counsel for the state was based upon what the testimony tended to show, there was no abuse of discretion of overruling a motion for new trial on the ground of misconduct. *State v. Jackson*, 588.

Same. Upon refusal of the court to permit an amendment pleading a material alteration in a contract, consisting merely of a collateral instrument, argument of counsel to the jury that the alteration vitiated the contract was improper; but as the exception to the argument in this case was not ruled upon by the trial court no error in this respect was presented for review on appeal. And although such misconduct was made a ground of a motion for new trial and an exception taken to the overruling of the motion, still as no error in overruling the motion is relied on in argument such misconduct is not ground for reversal. *Cedar Rapids National Bank v. Carlson*, 343.

Newly discovered evidence. Alleged newly discovered evidence having no probative value is not ground for a new trial. *Commercial National Bank v. Flickinger*, 97.

NUISANCE. See INTOXICATING LIQUORS.

OCCUPYING CLAIMANTS. See ATTORNEY AND CLIENT.

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PARTIES

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PARTIES.

Misjoinder as plaintiffs. The statute providing that all parties having an interest in the subject of an action and in the relief demanded may be joined as plaintiffs, unless it is otherwise provided, is designed to apply to all actions the rules which formerly obtained in chancery practice; but they must have a common interest in the cause of action and the relief sought; it is not sufficient that they each have a right of action growing out of the same transaction if the relief sought by each be distinct and unconnected. Hence in an action by several persons against a corporation and its directors to impress a lien upon an alleged trust fund, where no one plaintiff was interested in the cause of action or relief demanded by others, it was error not to require an election of the particular plaintiff in whose name the action should be prosecuted and a dismissal as to all others. *Miller v. Hawkeye Dredging Co.*, 557.

Money had and received: Recovery. Where a party by implied if not express consent permits the use of his name in litigation for the benefit of another, he can not because of such use of his name hold the money recovered to his own use. *Sutcliffe v. Pence*, 643.

Same: Evidence. In this action to recover money had and received evidence that defendant had stated that he would not give plaintiff an order for the money but that she might get it if she could was admissible, over the objection that it was a conclusion and hearsay. *Idem.*

PARTITION.

Taxation of attorney's fees. Attorney's fees are not taxable as costs in favor of plaintiff's attorney in partition proceedings, where the parties join issue and the defendant in good faith employs independent counsel. *Kuhn v. Downs*, 247.

Same: Appeal. The taxation of attorney's fees in partition proceedings is for the benefit of the party to the action and not the attorney; so that the attorney has no right of appeal from an order refusing to tax the same as costs. *Idem.*

PARTNERSHIP.

Dissolution: Option to repurchase : Construction. Plaintiff and defendant were law partners and plaintiff accepted defendant's proposition of dissolution on condition that defendant should fix a price on the firm property and business at which he would

PARTNERSHIP Continued

TO

PRACTICE

either buy or sell, and further that if plaintiff should elect to sell that he should have the right to repurchase the entire business within a given time at the same price: *Held*, that the price fixed by defendant for the sale related to a one-half interest in the business and property, and that plaintiff having elected to sell could not repurchase for the same amount he received, but should pay double that sum for the entire business. *Robbins v. Steele*, 520.

Same: Trusts: Burden of proof. The burden of proof is upon the member of a partnership who contends that he is entitled to become a joint owner of property purchased by the other member of the firm with his own funds, and which he has individually held and enjoyed until dissolution of the firm, to establish the trust. *Idem*.

PLEADINGS. See **CARRIERS—INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS—RAILROADS.**

Amendment. An amendment to a pleading after the sustaining of a demurrer which raises no new issues may properly be stricken on motion. *Mortland v. Poweshiek County*, 720.

PRACTICE.

Trial: Depositions: Waiver of error. An appeal from an order of the supervisors designating official county newspapers is a special proceeding; and, while not triable to a jury, is to be heard as an ordinary action, and the court is not authorized to order the case tried upon depositions or other written evidence. And although the appellant may have complied with an unauthorized order requiring the action to be tried on depositions, having excepted to the order, he did not thereby waive the error. *Cherokee Times v. Cherokee Republican*, 282.

Same: Right to offer additional evidence. Even though the appellant in such a case suffered no prejudice by an erroneous order that the case be tried on depositions, still a refusal to permit him to introduce additional testimony on the trial was erroneous. *Idem*.

Same: Prejudice: Presumption. The rule that when error is once shown, in an action triable on appeal upon the assignments of error, prejudice will be presumed, applies to an appeal from an order designating official newspapers, and a reversal will be ordered unless it is affirmatively shown that no prejudice resulted. And the appellant need not present more of the record

PRACTICE Continued

to

RAILROADS

than is sufficient to show the errors complained of. If the appellee claims that the erroneous rulings were not prejudicial he must show that fact. *Idem.*

Trial: Reopening cause: Discretion. The propriety of reopening a cause for further evidence after the parties have rested is largely a matter of discretion, and in the absence of its abuse the order of the trial court will not be disturbed. *First National Bank v. Fulton*, 734.

Same: Direction of verdict: Time of ruling: Discretion. It was within the discretion of the trial court to withhold a ruling on a motion to direct a verdict for plaintiff, upon reopening the cause for further evidence, until the close of all the evidence; and where upon the whole evidence the defendant was not entitled to judgment in any event, any informality in ruling upon the motion was not prejudicial. *Idem.*

Trial: Withdrawal of counts: Exclusion of evidence on retrial. Where certain counts of a petition are withdrawn from the jury and no appeal is taken from the court's action in that respect, it is proper on a retrial of the action to exclude evidence in support of the withdrawn counts. *Frohart Bros. v. Duff*, 144.

PRIMARY ELECTIONS. See ELECTIONS.

PUBLIC PRINTING. See MUNICIPAL CORPORATIONS—PRACTICE.

QUIETING TITLE. See REAL PROPERTY.

RAILROADS. See CARRIERS.

Crossings: Mandamus: Trial by court. *Mandamus* is the proper action to compel a railway company to construct a crossing for the accommodation of a landowner, and under the statute must be tried to the court whether of a legal or equitable nature; and a trial to a jury over objection is reversible error. *Klopp v. Chicago, M. & St. Paul Ry. Co.*, 466.

Crossing accident: Evidence: Conclusion: Prejudice. Where there was evidence in a railroad crossing accident warranting a conclusion that a certain engine was the one which struck deceased, and there was no attempt to show that it was not the engine, the testimony of a witness that he examined an engine of defendant's in the yards and that it came over the route of the accident on that day, while in the nature of a conclusion was not so prejudicial as to require a reversal. *Frederickson v. Iowa Cent. R. Co.*, 26.

RAILROADS Continued

Same: Crossing accident: Negligence: Evidence of custom.

Evidence of the general custom and habit of a decedent, as to his exercise of care on approaching a certain railway crossing, is competent in aid of the presumption that he was in the exercise of due care, there being no eye witness to the accident. *Idem.*

Same: Contributory negligence: Submission of issue. Although a railway crossing is so open that the approach of trains can readily be seen under ordinary circumstances and an exercise of ordinary care, still where there was a high wind and flying snow at the time of the accident, sufficient at times to largely obscure the vision, when taken in connection with the presumption of due care and the evidence of decedent's usual care on approaching the crossing, the question of contributory negligence was properly left to the jury. *Idem.*

Same: Duty to stop, look and listen. One is not required by law to stop, look and listen for approaching trains under all circumstances when about to cross a railway track, but this duty is governed by the existing conditions; and where the weather conditions were such that had deceased done so it might have been of no avail, his failure to exercise such a degree of care was not negligence as matter of law. *Idem.*

Crossing accident: Contributory negligence. One is not necessarily guilty of contributory negligence on approaching a railway crossing in a city by failing to stop, look and listen for an approaching train. In the instant case there was evidence tending to show that no proper signal or warning of the approach of the train was given; that the flagman was not at his place of duty; that the train was being operated at an unlawful rate of speed, and that the view of an approaching train was somewhat obstructed, and it is held that the question of contributory negligence was for the jury. *Marnan v. Chicago, R. I. & Pac. Ry. Co.*, 457.

Same. Where a railway crossing gate is open and the flagman gives no warning there is some assurance at least that the crossing can be made in safety; and such facts have a direct bearing on the question of whether the traveler who acted upon it exercised reasonable care. *Idem.*

Same: Evidence: Conclusion. The statement of a witness who saw deceased approaching the crossing that "I thought he was going to stop," was properly stricken as the conclusion of the witness. *Idem.*

RAILROADS Continued

Same: Negligence: Evidence. The evidence as to whether the flagman swung his lantern as a signal of the approaching train was in such conflict as to require submission with the other issuable facts. *Idem.*

Ejection of passengers: Intoxication. The statute authorizes railway companies to eject intoxicated passengers from their trains as a protection to the traveling public from the misconduct of drunken and disorderly persons; but in doing so they are not at liberty to use excessive force, or to knowingly imperil life or limb. In the instant case the conductor was justified in ejecting plaintiff, not only on the ground of intoxication but also because of refusal to pay his fare. *Adams v. Chicago G. W. Ry. Co.*, 31.

Same: Ejection of persons from station. A railway company may forcibly eject persons from its passenger stations, except within a reasonable time before, during or after the arrival and departure of its trains; but are not permitted to knowingly imperil the life or limb of such persons in so doing. *Idem.*

Ejection of passenger from station: Excuse: Evidence. Proof that a station agent offered to take an intoxicated person whom he had excluded from the station home with him did not relieve the company from liability for his injury from exposure, where the agent must have known that he was in such condition that he did not understand the offer. In the instant case the evidence is such as to require submission of the questions whether the agent offered to take the plaintiff home with him, or whether the agent knew that plaintiff did not understand the offer. *Idem.*

Injury to passenger: Negligence: Sufficiency of evidence. A passenger suing for personal injury because of alleged negligence in the operation of the train is not required to produce direct evidence of negligence of the employees. If he shows an unusual and violent jerk or jar of the car, such as would not ordinarily happen under an exercise of due care, that is sufficient to make a *prima facie* case. *Sever v. M. & St. L. Ry. Co.*, 664.

Negligent rate of speed. The question of whether a railway engine is being operated at a dangerous rate of speed is to be determined by the circumstances: Thus where a brakeman was riding on the front of a switching engine that was pushing a coal car and approaching other cars on the same track, a finding that six to eight miles an hour was a negligent and dan-

RAILROADS Continued

TO

REAL PROPERTY

gerous rate of speed would not have been without support. *Yeager v. Chicago, R. I. & Pac. Ry. Co.*, 166.

Same: Submission of issues: Pleadings. Where the petition charged that the engineer and fireman were negligent in running the engine, and in failing to stop in time to have avoided the accident and in failing to keep a lookout, making no separate charge of negligence against the fireman, and defendant did not ask that the allegations of negligence against them jointly be divided and separately submitted, the defendant could not contend on appeal that there was no evidence to support the alleged negligence of the fireman. *Idem.*

Same: Contributory negligence. Contributory negligence will not defeat recovery for a personal injury unless it causes or contributes to the injury. *Idem.*

Same: Damages. The amount of recovery for injuries occasioning death is governed largely by the earning capacity and expectancy of the deceased; and in this case a judgment of \$9,000 for the death of a brakeman is upheld. *Idem.*

RAPE. See CRIMINAL LAW.

REAL PROPERTY.

Accretions: Division by agreement. Accretion is the gradual and imperceptible accumulation of land along the bank of a stream or body of water; and where adjoining landowners are each entitled to a portion of such accretions they may agree to a division of the same irrespective of their exact legal rights. *McCoy v. Paxton*, 194.

Boundaries: Oral agreements: Possession: Statute of frauds. An oral agreement fixing a division line between adjoining owners is not within the statute of frauds, where each takes possession under the agreement with the knowledge of the other, regardless of the question of time; and such possession is sufficient if it clearly indicates an appropriation by the party who claims to own the property, without regard to personal occupancy, cultivation or improvement. In this action defendant's possession is held sufficient to uphold the oral agreement fixing the division line. *Idem.*

Same: Acquiescence. Acquiescence in a boundary line, with possession up to the same, for a period of ten years, is conclusive evidence of an agreement for its establishment. *Idem.*

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Boundaries: Location by agreement: Evidence. The statements of a lot owner that he was satisfied with the boundary as indicated by the line of the sidewalk, made at a time when neither party supposed he was agreeing to the location of a disputed boundary, were mere expressions of opinion and insufficient to establish an agreed line. *Harris v. Lewis*, 413.

Acquiescence: Estoppel. Where a boundary line as marked by a sidewalk and by a terrace was not established by acquiescence, the making of improvements at slight cost with respect thereto, which were in no manner induced by anything said or done by defendant, and which could be removed without injury to the land, would not estop the defendant from claiming to the true line. *Idem*.

Location of street lines: Evidence. It will not be assumed that trees planted along the streets in cities and towns are on the line of the street, in the absence of proof of that fact, as common observation is otherwise. *Idem*.

Same. Long continued occupancy of city lots with improvements according to the street lines and corners, as marked at the time the plat was filed, is better evidence of their correct location than the measurements of a surveyor based on assumed corners. *Idem*.

Boundaries: Acquiescence: Evidence. Where a boundary fence has been recognized and acquiesced in by adjoining landowners for a long series of years as marking the true boundary line between their lands, and their occupancy has been apparently with reference to such fence, the presumption arising from such acquiescence is sufficient to determine the location of the line, unless there are controlling circumstances such as will overcome the presumption. In the instant case the evidence is held to show an established line by acquiescence. *Savage v. Armstrong*, 473.

Same: Estoppel. It is also held that the conduct of the plaintiffs was such as to estop them from contending that the line thus acquiesced in is not the true boundary. *Idem*.

Contract of sale: Rescission: Forfeiture. The provision in a land contract that if the title to the property can not be made good within a certain time in the judgment of a third person, the earnest money shall be returned and the contract canceled, is one for rescission and not forfeiture, and therefore the statute requiring notice of forfeiture is not applicable; and the mistaken claim of the purchaser and such third person that the

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title can not be made good except upon payment of a certain mortgage authorized the grantor to rescind. *Vittengl v. Vittengl*, 41.

Specific performance: Relief to party denied performance. Although the purchaser in this case was not entitled to specific performance of the contract, the vendor having exercised a right of rescission, still as he had in good faith deposited money to pay the amount of a mortgage on condition that he have the same assigned to him, and the money was so applied to the benefit of the vendor, though without specific authority or assignment of the mortgage, the purchaser was entitled to a decree requiring the vendor to repay the amount or to subrogate him to the lien of the mortgage on the ground that the money was used by mistake to discharge the same. *Idem*.

Contract of purchase: Part performance. A vendee of real property may offset any claim due him from the vendor against the purchase price, but in the absence of any agreement the mere existence of such indebtedness will not operate as part performance of the contract. *Ida County Sav. Bank v. Johnson*, 234.

Option agreements. An option to purchase real estate is not a sale, nor is it an agreement to sell; but is simply a continuing offer, which must be accepted before it will become an enforceable contract. *Rampton v. Dobson*, 315.

Same: Easements: Threatened interference: Injunction by tenant. An agreement of the owners to add a strip of their abutting property to the sidewalk space, and not to build thereon, constitutes a covenant running with the land and binding upon subsequent grantees; and a tenant entitled to the use and benefit of such an easement has such an interest therein that he may enjoin anyone threatening to interfere with that use. *Johnson v. Robertson*, 64.

Building covenants: Rights of tenant. The owner of property for the benefit of which he has made building restrictions can not deprive his tenant of the right to such restrictions. *Idem*.

Abandonment of rights: Evidence. The owner or lessee of property, for the benefit of which building restrictions have been created, will not be held to have abandoned his right to enforce the same by permitting slight and immaterial violations of the agreement, so long as the right to enforce the same is of value to him, and such violations do not interfere with the substance

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of the agreement. In the instant case the showing is held insufficient to establish abandonment or waiver of the right to insist on the restrictions of a building covenant. *Idem.*

Same: Estoppel. The fact that plaintiffs had used a small portion of the strip of land in controversy not strictly in accordance with the building covenant, by erecting thereon temporary show cases with permission of adjoining owners, and with the understanding that they were to be removed at any time in case of protest, did not estop them from claiming the right to enforce the covenant against the erection of a permanent structure covering practically the entire strip. *Idem.*

Quieting title: Evidence. In this action for possession and to quiet title the evidence is reviewed and it is *held*, that there was an agreed price for the land and that defendant went into possession in anticipation of the mutual performance of the agreement. *Ida County Savings Bank v. Johnson*, 234.

Same: Pleadings: Equitable relief. Where the plaintiff asks simply for the possession of land, rents and profits and that his title be quieted, and the defendant pleads simply the conclusion that he bought the land and entered into possession, neither of the parties making any reference to the nature of the contract, whether executed or executory, or whether performed in whole or in part, the pleadings will not authorize equitable relief based on the contract, although existence of the same may appear from the evidence. *Idem.*

Contract of purchase: Pleadings: Evidence. Although the failure of plaintiff, in an action for possession of land and to quiet title, to ask alternative relief by way of recovery of the purchase price may excuse defendant from pleading a counterclaim, still where the legal title is in plaintiff defendant is bound to justify his possession; and if he bases this right upon a contract of purchase he must plead and prove the contract and performance or tender of performance on his part. *Idem.*

Contract price: Evidence. The evidence in this action is held to support the defendant's contention as to the contract price of the land in question. *Idem.*

Same: Appeal: Determination of issues: Remand. In this action plaintiff sought possession, rents and profits, and asked that his title be quieted to the land in controversy. Defendant pleaded purchase and possession and asked that his title be quieted. The evidence established defendant's contract of purchase and his possession, but failed to disclose payment. There was evidence that

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defendant had performed services for plaintiff which might have been applied on the purchase price, but there was no showing of the amount of the services. Plaintiff's right of action for the price and defendant's action for the services are now barred. *Held*, that a reversal of the judgment for defendant would be inequitable; that defendant was entitled to an enforcement of the contract and to have his title quieted, but that he should pay the full purchase price, subject to any offset for services, and the cause is remanded with leave to both parties to amend their pleadings to this end. *Idem*.

REFERENCE OF CAUSES. See ACTIONS.

REFORMATION OF INSTRUMENTS. See EQUITY.

REMOVAL OF CAUSES. See INJUNCTION.

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Action for price: Burden of proof. In an action for goods sold and delivered, to which defendant answered by a general denial, the burden was upon plaintiff to prove that he sold or furnished the goods to defendant at his request, the nature or description of the same, the agreed price, or, in the absence of an agreement, the reasonable value of the goods. *Quaker City Cut Glass Co. v. Webber*, 678.

Passing of title. As a general rule the title to personalty passes upon delivery and acceptance, even though the purchaser has the option upon inspection to rescind and return the property; but where anything remains to be done by the parties, either by way of identification, or to its kind or quality, or the sale is upon approval or test the title does not pass until the approval is given or the test made. *Wesco Supply Co. v. Allerton*, 695.

Same: Intent of parties: Evidence. The real question in determining whether title to personalty has passed is the intent of the parties, to be gathered from their contract, acts and conduct with reference to the transaction; and this is generally a question of fact for the jury. In the instant case the evidence is held to justify a finding that it was the intent of the parties that title should not pass until a complete test was made to ascertain whether it was of the kind bargained for, and that this condition was not waived. *Idem*.

Transfer of title: Delivery through carrier. Where the seller of property consigned the same to his own order for shipment, taking a bill of lading and requiring a surrender of the same

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properly indorsed before delivery of the property to the purchaser, and the bill of lading with a draft attached was forwarded for collection, the title and control of the property remained in the seller until payment of the draft and delivery of the bill of lading to the purchaser, although there was a direction on the bill of lading to deliver the same to the purchaser. *Reed v. Racine Boat Co.*, 12.

Same. Where property is consigned to the seller with instructions to deliver the same to the purchaser upon payment of a sight draft and surrender of the bill of lading, the fact that the purchaser was to pay transportation charges did not constitute the carrier his agent, so that mere delivery of the property to the carrier was delivery to the purchaser, thus passing the title. Neither did the fact that the bill of lading bore a direction to deliver the property to the purchaser waive the express provision that the same properly indorsed should be required before delivery; nor did it constitute the purchaser the consignee of the shipment. *Idem.*

Same. Where the seller of property, consigned to his own order, in good faith negotiated the bill of lading with a draft for the price attached, the legal title to the property vested in the purchaser of the bill of lading and draft, and this title could not be divested by the unauthorized act of the carrier in delivering the property to the purchaser without requiring a surrender of the bill of lading as provided therein, or by garnishment of the buyer by a creditor of the seller. *Idem.*

Warranties: Variance by parol: Pleadings. The express warranties of a written contract of sale can not be varied or added to by parol proof of oral representations, made preceding or contemporaneous with the written contract, and which in themselves amount to an express warranty. Thus in an action for the price of an article sold under a written warranty the defendant alleged that in negotiating the sale plaintiff orally represented that the article was what the defendant needed, that he relied upon the statements, that the article was not as represented and that the same failed to comply with the representations additional to written warranties, the court properly struck from the answer all such allegations as did not tend to plead an implied warranty that the article was not suitable for the purpose desired, and that it did not comply with the written warranties. *Four Traction Auto Co. v. Hurni*, 725.

Same: Express warranties. To constitute an express warranty it is not necessary that the word warranty be used; it is suffi-

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cient if the terms used import representations on which the seller intends the buyer may rely, and on which he does rely, that the article sold shall be of a certain character or that it will fulfill certain conditions. *Idem*.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS—TAXATION.

SPECIFIC PERFORMANCE. See REAL PROPERTY.

STATUTE OF FRAUDS.

When question of fact. Where the chief purpose of a promisor is to promote or subserve some interest of his own his oral promise to pay the debt of another is not within the statute of frauds, even though the original debtor is not released; but where his object is to become a surety or guarantor for another his obligation must be in writing to be enforceable; and if the evidence is conflicting as to whether the promise is independent or collateral the question is for the jury. *Frohart Bros. v. Duff*, 144.

SUBROGATION. See SURETYSHIP.

SURETYSHIP.

Husband and wife. By joining with her husband in a mortgage of the homestead as additional security for notes of the husband signed by the wife simply as surety, and from which she derived no benefit, she stands merely in the position of surety and is entitled to protection as such. *Lingenfelter Bros. v. Bowman*, 649.

Fraud of principal. One dealing with a surety must exercise the utmost good faith at every step of the transaction; he can do nothing to deceive or mislead the surety without vitiating the agreement. In this case the creditor induced the wife to mortgage their homestead as additional security for the husband's debt by false representations knowingly made, that the property already mortgaged to secure the debt was ample security, and that the homestead would not be called upon to bear any part of the burden. *Held*, that the transaction was void for fraud. *Idem*.

Subrogation. While as a general rule a surety can not be subrogated to the rights of a creditor until he has paid the creditor's debt, still a court of equity has power to protect the rights

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of the surety who has been asked to pay the debt by a proper decree. *Bankers' Surety Co. v. Linder*, 486.

Necessity of payment: Refusal: Effect. Where a creditor was given judgment against his debtor and the same was made a lien on any interest the debtor had in certain land, and the surety on the debtor's supersedeas bond not only offered to pay the judgment on the bond rendered on appeal, provided its right of subrogation was protected, but before judgment was rendered against the debtor made a tender of the amount and offer of payment provided the creditor would assign the judgment, the creditor was not justified in refusing the same on the ground that it would prejudice her individual right in the land or that of others under an alleged prior deed from the judgment debtor, and such refusal relieved the surety from paying the judgment until its right of subrogation was protected by proper decree; as the right of subrogation depends upon no request or contract of the debtor, but is entirely dependent upon the relations of surety and creditor. *Idem*.

Rights of survey. By performing the obligation of suretyship the debt is discharged as respects the creditor but is kept alive as between all of the parties for the purpose of enforcing the rights of the surety. *Idem*.

Release of securities: Effect. Upon payment of the debt a surety is entitled to subrogation to all the securities held by the creditor for its payment, from whatever source obtained; and if by act or conduct he releases the securities, or makes them unavailing to the surety, the surety is to that extent relieved. *Idem*.

Rights of creditor after payment. After a creditor receives payment or its equivalent in equity, he has no right to interfere with any disposition of the judgment which the court makes between the defendants, or the surety and the principal debtor or a stranger to the litigation. *Idem*.

Appeal: Grounds for reversal. Where a surety was entitled, before paying the judgment against it, on affirmance of the principal judgment, to a decree establishing its right to subrogation and to an assignment of the judgment, the dissolution of a temporary injunction in a suit to secure subrogation and an assignment of the judgment will be reversed, for the purpose of relieving it of liability on the bond, although in the meantime it had been compelled to make an involuntary payment of the judgment against it. *Idem*.

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Enforcement of rights: Jurisdiction. Where the appellate court, on affirmance of the principal judgment, rendered judgment against the surety on the supersedeas bond, the district court had jurisdiction of a suit by the surety to protect its rights to subrogation before paying the principal judgment. *Idem.*

Adjudication. Upon affirmance of the principal judgment the appellee is entitled to judgment against the surety on the supersedeas bond, and the entry of such judgment is not an adjudication of the right of the surety to subrogation, or any of the questions which may be involved in a trial of that right, but it may thereafter enforce its right by suit in equity, or under the statute providing for subrogation. *Idem.*

Subrogation: Extent of rights acquired. A surety acquires no greater right by subrogation than the creditor had; so that where the judgment against the debtor was made a lien upon certain real estate it would only affect the interest of the debtor, and by subrogation of the surety any interest therein of the creditor would not be affected. *Idem.*

Right of subrogation. Where one appeals from a judgment which was made a lien upon certain land, and upon affirmance of the judgment the plaintiff on motion also obtained judgment against the surety on the supersedeas bond, the original judgment was not merged in the latter so as to extinguish the lien, so far as the surety is concerned, but the right of subrogation will be preserved to the surety. *Idem.*

TAXATION. See MUNICIPAL CORPORATIONS—WILLS.

Cancellation of assessment: Burden of proof. A taxpayer claiming that he was not possessed of property with which he was assessed is charged with the burden of proving that fact; and in the absence of any evidence from him on the subject the court is not justified in cancelling the assessment on the ground that defendant offered no evidence that he had such property for taxation. *Barhydt v. Cross*, 271.

Same: Objections to assessment: Waiver. A taxpayer can not question on appeal the form of an assessment made by a board of review, where he failed to raise that question before the board. *Idem.*

Same: Residence: Evidence. For the purpose of taxation a person must have a domicile or residence somewhere, and his old residence will be deemed his present one until a new one has been acquired. In the instant case the plaintiff and his

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wife lived continuously at one place in this state for many years, and while living there they left for a trip around the world, leaving the house furnished and in the possession of a caretaker. *Held*, that that was his place of residence for the purpose of taxation during his trip aboard, even though he may have intended removing to another state upon their return to this country, and in fact did purchase property and make their residence in such other state upon their return. *Idem*.

Land contracts. A written agreement to purchase real property and to pay therefor a stated sum at specified times, a portion of which was paid on the execution of the agreement, and with right of forfeiture in case of default, constitutes a binding contract which is taxable to the vendor, and is not a mere option to purchase. The agreement in this case as written and under the construction placed upon it by the parties at the trial is held to constitute an enforceable contract. *Rampton v. Dobson*, 315.

Trusts: Estate created. A devise of land to trustees, with power of sale and direction to set aside a portion for the establishment, erection and maintaining of a charitable institution, the balance to be paid to the trustees of a certain college as an endowment fund, passed the legal title to the trustees under the will, with the equitable ownership in the ultimate beneficiaries. By the devise in this case an active trust was created to which the statute of uses does not apply. *Elsworth College v. Emmet County*, 52.

Trust property: Exemption. Generally all property held under a testamentary trust is to be taxed to the trustee; but under our statute the bequest in this case to the educational institution as an endowment fund is exempt from taxation, while that portion of the bequest for the charitable institution was subject to taxation, in the absence of any showing of the nature of the institution when established. *Idem*.

Trusts: Interest of beneficiaries. Ordinarily the rents and profits and the increased value of trust property accruing before actual conversion go to the beneficiary. *Idem*.

TRANSFER OF CAUSES. See ACTIONS.

TRUSTS. See PARTNERSHIP—TAXATION.

Evidence. In this suit to impress a trust upon land held by defendant the evidence is reviewed and held insufficient to establish the trust agreement relied upon by the intervener. *Matt v. Matt*, 503.

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Action to establish a trust: Estoppel. Where land was conveyed to a son, reserving a life estate to the grantors, with a mortgage back for the benefit of his brothers and sisters, and thereafter the surviving mother brought suit to set aside the transaction and recover her distributive share, to which the beneficiaries were made parties, but none of whom questioned the grantee's ownership and some of them made affidavit in support of his title, they could not thereafter claim that he held title subject to any trust in their favor different from that expressed in the mortgage. *Idem.*

VERDICT. See DAMAGES.

WARRANTIES. See SALES.

WATERS. See DRAINAGE.

WILLS. See ESTATES OF DECEDENTS.

Probate: Evidence: Declarations of devisee. The declarations of one devisee against his interest are not admissible in a probate proceeding, if the effect would be to overthrow the will, which includes provisions in favor of other devisees. *Lawless v. Lawless*, 184.

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